Petition

81-1600

Office - Supreme Court, U.S.
FILED
FEB 27 1982
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF ALABAMA,

Petitioner

v.

WAYNE EUGENE RITTER,

Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE ALABAMA SUPREME COURT

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

EDWARD E. CARNES
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

Counsel of Record

250 Administrative Bldg.
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED

1. Does Beck v. Alabama, 447 U. S. 625 (1980), require the reversal of all Alabama pre-Beck capital convictions, including those in which there was absolutely no evidentiary basis for a lesser included offense instruction and in which the defendants admitted, confessed, and pleaded guilty to the capital offense?

2. Is prejudice an essential component of a due process fundamental fairness claim?

3. Even where there is a constitutional violation, should a conviction be set aside absent harm and prejudice?

4. Does the rule of Brady v. United States, 397 U.S. 742 (1970), that a guilty plea waives all non-jurisdictional defects apply to a capital case in which the

defendant after pleading guilty is sentenced to death?

PARTIES

The caption contains the names of all parties to the proceeding in the court below.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED..... i

PARTIES..... ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES..... vii

OPINIONS BELOW..... 1

JURISDICTION..... 4

CONSTITUTIONAL PROVISION INVOLVED..... 5

STATEMENT OF THE CASE..... 5

The Facts..... 5

The Trial Court Proceedings..... 9

The Appellate Court Proceedings..... 14

REASONS FOR GRANTING THE WRIT..... 19

I. The Decision Below Presents Federal Questions which Are the Same as or Similar to Three Questions on which Certiorari Has Already Been Granted in the Case of this Respondent's Co-defendant.... 19

II. The Decision Below Misinterprets and Misapplies

PAGE

this Court's Decision in Beck v. Alabama, 447 U.S. 625 (1980), and is Contrary to Related Decisions of this Court..... 23

III. The Decision Below is Contrary to Decisions of this Court Concerning Harm and Prejudice as a Prerequisite to a Due Process Fundamental Fairness Claim and as a Prerequisite to a Reversal when a Constitutional Violation is Established..... 28

IV. The Decision Below is Either Contrary to Decisions of this Court Concerning the Effect of Guilty Pleas, or It Presents an Important Federal Issue Concerning the Effect of Guilty Pleas Which this Court Has Not Yet Addressed But Should..... 38

IN THE ALTERNATIVE, THIS PETITION SHOULD NOT BE RULED ON UNTIL THIS COURT DECIDES THE EVANS CASE..... 46

CONCLUSION..... 49

CERTIFICATE OF SERVICE..... 50

PAGE

APPENDIX A:
February 1, 1982
Alabama Supreme Court
Judgment Order (After
Second Remand)..... 1a

APPENDIX B:
January 8, 1981
Alabama Supreme Court
Order Denying
Rehearing (After
Second Remand)..... 5a

APPENDIX C:
December 11, 1981
Alabama Supreme Court
Opinion (After Second
Remand)..... 6a

APPENDIX D:
October 13, 1981
United States Supreme
Court (Second) Remand
Order..... 10a

APPENDIX E:
June 12, 1981 Alabama
Supreme Court Order
Denying Rehearing
(After First Remand)..... 11a

APPENDIX F:
June 12, 1981 Alabama
Supreme Court Opinion
On Rehearing (After
First Remand)..... 13a

PAGE

APPENDIX G:
May 8, 1981 Alabama Supreme Court Judgment Order (After First Remand)..... 32a

APPENDIX H:
May 8, 1981 Alabama Supreme Court Opinion Before Rehearing (After First Remand)..... 34a

APPENDIX I:
June 30, 1980 United States Supreme Court (First) Remand Order..... 48a

APPENDIX J:
July 6, 1979 Opinion of the Alabama Supreme Court (Before Remand)..... 50a

APPENDIX K:
February 5, 1982 Opinion of the Alabama Supreme Court in the case of Lane v. State..... 73a

TABLE OF AUTHORITIES

CASES	PAGE
Alabama v. Ritter, No. 81-247	3, 16
Beck v. Alabama, 447 U.S. 625 (1980)	passim
Beck v. State, 396 So. 2d 645 (Ala. 1980) (on remand)	26
Beck v. Washington, 369 U.S. 541 (1962)	33
Brady v. Maryland, 373 U.S. 83 (1963)	36
Brady v. United States, 397 U.S. 742 (1970)	43, 45
Cupp v. Naughten, 414 U.S. 141 (1973)	34
Donnelly v. DeChristoforo, 416 U.S. 637 (1974)	33-34
Enmund v. Florida, No. 81-5321 (U.S., cert. granted Oct. 19, 1981)	7
Evans v. Britton, 472 F. Supp. 707 (S.D. Ala. 1979), rev'd, 628 F. 2d 400 (5th Cir. 1980), opinion extended on rehearing, 639 F. 2d 221 (1981), cert. granted, No. 80-1714 (U.S. June 22, 1981)	passim

CASE PAGE

Evans and Ritter v. State, 361 So. 2d 654 (Ala. Cr. App. 1977), aff'd sub nom. Evans v. State, 375 So. 2d 666 (Ala. 1978), cert. denied, 440 U.S. 930 (1979).....passim

Fulghum v. State, 291 Ala. 71, 277 So. 2d 886 (1973).....30

Graham v. State, 403 So. 2d 275 (Ala. Cr. App. 1980), writ quashed, 403 So. 2d 286 (Ala. 1981).....39

Gray v. State, 394 So. 2d 92 (Ala. Cr. App.), cert. denied, 399 So. 2d 840 (Ala. 1981).....30

Harris v. State, 398 So. 2d 777 (Ala. Cr. App.), cert. denied, 398 So. 2d 780 (Ala. 1981).....30

Henderson v. Kibbe, 431 U.S. 145 (1977).....34

Hopper v. Evans, No. 80-1714 (cert. granted, June 22, 1981).....passim

Ingraham v. Wright, 430 U.S. 651 (1977).....33

Lane v. State, No. 80-803 (Ala. 1982).....40-44

CASE	PAGE
Prothro v. State, 370 So. 2d 740 (Ala. Cr. App. 1979)	39
Reed v. State, 407 So. 2d 162 (Ala. 1981)	17
Ritter v. Alabama, 448 U.S. 903 (1980)	2, 15-16, 21, 41
Ritter v. State, 375 So. 2d 270 (Ala. 1979)	passim
Ritter v. State, No. 77-798 (Ala. May 8, 1981) (on rehearing)	1-2, 16, 18 27, 44
Ritter v. State, 403 So. 2d 154 (Ala. June 12, 1981) (on rehearing)	2, 16, 25, 27-28, 31, 39, 41
United States v. Agurs, 427 U.S. 97 (1976)	35
United States v. Blue, 384 U.S. 251 (1966)	36
United States v. Lovasco, 431 U.S. 783 (1977)	35
United States v. Marion, 404 U.S. 307 (1971)	35

CASE PAGE

United States v. Morrison,
101 S. Ct. 665 (1981).....36-37

OTHER AUTHORITIES

Carnes, Alabama's 1981 Capital
Punishment Statute, 42 Ala.
Law. 456 (July, 1981).....41

OPINIONS BELOW

1. The opinion of the Alabama Supreme Court affirming Respondent's conviction and sentence, before the case was remanded to it from this Court, is reported as Ritter v. State, 375 So. 2d 270 (Ala. 1979), and is reproduced as Appendix J, hereto, pp. 50a - 72a, infra.[1]

2. The opinion of the Alabama Supreme Court reversing Respondent's conviction and sentence, after the case was remanded to it by this Court for further consideration in light of Beck v. Alabama, 447 U.S. 625 (1980), in Ritter v. State, No. 77-798 (Ala. May 8, 1981) (on first remand) (before rehearing), is not reported, but it is

---

[1]The appendix to this petition is separately bound pursuant to Rule 21.1(k).

reproduced as Appendix H, hereto, pp. 34a - 47a, infra.[2]

3. The extension of the opinion of the Alabama Supreme Court in response to the State's application for rehearing is reported as Ritter v. State, 403 So. 2d 154 (Ala. June 12, 1981) (on first remand) (on rehearing), and it is reproduced as Appendix F, hereto, pp. 13a - 31a, infra.

4. The opinion of the Alabama Supreme Court in Ritter v. State, No. 77-798 (Ala. Dec. 11, 1981) (on second remand), explaining that its decision reversing Respondent's conviction and sentence was based on federal constitutional grounds and not on state law grounds, is not yet

---

[2]The June 30, 1980 order of this Court vacating the Alabama Supreme Court's prior judgment and remanding the case for further consideration in light of the Beck decision is reported as Ritter v. Alabama, 448 U.S. 903 (1980), and is reproduced as Appendix I, hereto, pp. 48a - 49a, infra.

reported, but it is reproduced as Appendix C hereto, pp. 6a - 9a, infra.[3]

---

[3]The Alabama Supreme Court's explanatory December 11, 1981 opinion was issued in response to this Court's October 13, 1981 order in Alabama v. Ritter, No. 81-247, remanding the case for further consideration in light of Reed v. State, 407 So. 2d 162 (Ala. 1981). This Court's October 13, 1981 remand order is reproduced as Appendix D hereto, p. 10a, infra.

JURISDICTION

The judgment of the Alabama Supreme Court which is sought to be reviewed was rendered on December 11, 1981. See Appendix A, hereto, pp. 1a - 4a, infra, and Appendix C, hereto, pp. 6a - 9a, infra.[4]

Respondent's timely application for rehearing was denied in an order entered on January 8, 1982. See Appendix B, hereto, p. 5a, infra. This petition is filed within sixty days of that denial, as permitted by Rule 20.4.

---

[4]Pursuant to Alabama Rule of Appellate Procedure 41(a), the December 11, 1981 judgment was not issued and dated until after the rehearing application was denied.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution:

> "...nor shall any State deprive any person of life, liberty, or property without due process of law..."

STATEMENT OF THE CASE

The Facts

In December of 1976, Respondent Wayne Eugene Ritter was released from an Indiana pentitentiary on parole from a sentence for robbery. (Tr. 217, 293, 338)[5] While in

---

[5]References to "Tr." are references to the two-volume record of Ritter's trial, which is part of the appellate record in this case.

prison, he had met another inmate named John Louis Evans, and they had agreed that once released they would "jump parole" and go on a cross-country crime spree together. (Tr. 211, 322, 338) After leaving Indianapolis on Christmas Day, 1976, Ritter and Evans committed armed robberies in three different cities. (Tr. 323) They then went to Mobile, Alabama to commit another robbery. (Tr. 212, 324)

On January 5, 1977, in Mobile, Ritter and Evans robbed a pawn shop where Edward A. Nassar was employed. (Tr. 211-219, 324-325) During the robbery, Evans shot Nassar in the back while Nassar's seven-and nine-year old daughters watched. (Tr. 142, 215-219, 324-325) The bullet wound in Mr. Nassar's back killed him. (Tr. 211, 215, 219-220)

While Ritter did not fire the shot that killed Mr. Nassar, the only reason he did not shoot Nassar was because Evans was

standing in his line of fire at the time. (Tr. 221, 340-341) Ritter and Evans had agreed beforehand that they would kill anyone they had to in one of their robberies, and when Mr. Nassar was shot, Ritter stood ready and willing to assist Evans in any way he could. (Tr. 220-221, 341) At the time Evans shot Mr. Nassar, Ritter had loaded a pistol he had gotten from Nassar, and Ritter would have shot Nassar if Evans had not been in the way. (Tr. 221, 347)[6] Ritter took the stolen

---

[6]The Alabama Supreme Court held that Ritter was just as culpable in and responsible for the intentional killing as Evans. Ritter v. State, 375 So. 2d 270, 274-275 (Ala. 1979), pp. 60a - 63a, infra.

Because Ritter's conviction was based on a finding that he had intent to kill and aided and abetted the intentional killing as well as the robbery, this petition will in no way be affected by the outcome of Enmund v. Florida, No. 81-5321 (U.S., cert. granted Oct. 19, 1981).

pistol, and he and Evans ran out of the pawn shop and were seen by four or five witnesses. (Tr. 100-101, 131-133, 342)

In the two months after they murdered Nassar, Ritter and Evans committed numerous violent crimes, including more robberies, in a half dozen different states. (Tr. 326-329) They were finally apprehended in Arkansas by FBI agents on March 7, 1977. (Tr. 156-166) The pistol which Ritter had stolen during the robbery-murder of Mr. Nassar was found in Ritter's automobile at the time of his arrest. (Tr. 159-162, 220-221)

On March 8, 1977, after being advised of his rights, Ritter voluntarily confessed to the FBI his involvement in the robbery-murder of Mr. Nassar and the numerous other crimes which he had committed

while on the spree with Evans. (Tr. 171, 275-276, 293-312)

After waiving extradition, Ritter was transported to Mobile, Alabama, where, on March 11, 1977, after again waiving his rights, Ritter voluntarily confessed to Mobile Police Department officers his full involvement in the robbery and murder of Mr. Nassar. (Tr. 279-281)

The Trial Court Proceedings

On April 4, 1977, Ritter voluntarily appeared before the Mobile County Grand Jury, and against the advice of his attorney freely testified at length concerning his participation in the robbery and murder of Mr. Nassar and about the other crimes he and Evans had committed. (Tr. 24, 338-347) During that testimony, Ritter admitted all

of the elements of the capital offense consisting of the robbery and murder of Mr. Nassar. (Tr. 339-346)

Ritter told the grand jury that if he ever got free, he would probably go back to robbery and would kill again if necessary. (Tr. 344-345) He also told the grand jury that he intended to plead guilty at trial and wanted to be executed. (Tr. 345-346) Ritter gave the following explanation for why he did not plan to contest his guilt of the capital charge at the trial:

> Q. Is there any reason why you want to give this Grand Jury why you want to be electrocuted rather than face a trial by jury?
>
> A. Uh, the jury would convict me. There's enough evidence. I've told everybody I've done it, uh, why waste their time and mine?
>
> Q. All right. Is there any reason why you would rather be electrocuted than, uh, plead guilty and try it and possibly have your sentence reduced to life without parole?

> A. Uh, I can't see doing the rest of my life and I would, even if I got parole here, there are nine other states waiting with enough charges to give me life (inaudible) on every one of them. (Tr. 346)

After being indicted, Ritter filed on April 13, 1977, a written notice of intent to plead guilty to the capital charge. (Tr. 21)

At arraignment on April 18, 1977, against the advice of his attorney, Ritter pleaded guilty to the capital charge. (Tr. 27, 29, 48-60) The trial court entered the guilty plea in the official minutes of the court (Tr. 27, 29), and notwithstanding that plea the case was submitted to a jury for the reasons discussed on pp. 39 - 41 of this petition, below.

Evans and Ritter were jointly tried before a Mobile County jury on April 26, 1977. (Tr. 8, 72-228) The evidence

presented by the State at Ritter's trial is summarized in the Alabama Court of Criminal Appeals' initial opinion in this case in Evans and Ritter v. State, 361 So. 2d 654, 656-661 (Ala. Cr. App. 1977); in its second opinion reported as Ritter v. State, 375 So. 2d 266, 267 (Ala. Cr. App. 1978); and in the Alabama Supreme Court's opinion reported as Ritter v. State, 375 So. 2d 270, 273 (Ala. 1979) (before the case was returned to it on remand from this Court), pp. 53a - 55a, infra.

After the State rested, Ritter filed a written "Request to Enter Guilty Plea" which was admitted into evidence and went to the jury. (Tr. 207-208, 252, 283) Ritter also took the stand, against the advice of his attorney, and admitted every element of the capital offense. (Tr. 216-221) The last

part of his direct examination is as follows:

> Q. Mr. Ritter, do you want to say anything to these people sitting in the Jury Box as to what you want them to do when they go back there?
>
> A. Well, I think there are two considerations. First, we did kill Mr. Nassar. We knew we might have to kill somebody during any robbery. We had discussed it before. If anybody went for a gun, that's what was going to happen. We did kill him, so, really, the only thing you can come back with is the death penalty. And the other consideration is, if you give me life, or if I got life imprisonment, I could get out in ten or fifteen years, and when I got out, I know where everybody on the Jury lives, and I wouldn't appreciate being in prison for ten or fifteen years, so I think I would have to come after you. That's about it.
>
> (Tr. 219-220)

The jury took less than fifteen minutes to convict Ritter of the capital offense. (Tr. 226-227) Following a sentence hearing on

April 27, 1977, the trial court sentenced Ritter to death. (Tr. 30-33, 229-237)[7]

The Appellate Court Proceedings

The Alabama Court of Criminal Appeals on October 25, 1977 affirmed Ritter's conviction and sentence in Evans and Ritter v. State, 361 So. 2d 654 (Ala. Cr. App. 1977).

On May 19, 1978, the Alabama Supreme Court issued a decision affirming in part Ritter's conviction and sentence, but

---

[7]Evans was also convicted of the capital offense and sentenced to death. His conviction and sentence were affirmed in Evans and Ritter v. State, 361 So. 2d 654 (Ala. Cr. App. 1977), aff'd sub nom. Evans v. State, 375 So. 2d 666 (Ala. 1978), cert. denied, 440 U.S. 930 (1979).

Evans was denied a writ of habeas corpus in Evans v. Britton, 472 F. Supp. 707 (S.D. Ala. 1979), rev'd, 628 F. 2d 400 (5th Cir. 1980), opinion extended on rehearing, 639 F. 2d 221 (1981), cert. granted, No. 80-1714 (U.S. June 22, 1981). See pp. 19-22 and 46 - 48, of this petition, below.

remanding the case to the Court of Criminal Appeals for consideration of the non-triggerman issues. Evans and Ritter v. State, 361 So. 2d 666 (Ala. 1978). On remand, the Court of Criminal Appeals in an August 9, 1978 opinion decided the non-triggerman issues against Ritter and again affirmed his conviction and sentence. Ritter v. State, 375 So. 2d 266 (Ala. Cr. App. 1978).

Following return of the case from remand, the Alabama Supreme Court on July 6, 1979, affirmed Ritter's conviction and sentence. Ritter v. State, 375 So. 2d 270 (Ala. 1979), pp. 50a - 72a, infra.

On June 30, 1980, this Court entered an order vacating the judgment and remanding the case to the Alabama Supreme Court "for further consideration in light of Beck v. Alabama, 447 U.S. 625 (1980)." Ritter v.

Alabama, 448 U.S. 903 (1980), pp. 48a-49a, infra.

On remand, the Alabama Supreme Court in a May 8, 1981 decision reversed Ritter's conviction and sentence. Ritter v. State, No. 77-798 (Ala. May 8, 1981) (before rehearing), pp. 34a-47a, infra.

On June 12, 1981, in response to the State's application for rehearing, the Alabama Supreme Court extended its original opinion to explain the basis for its decision. Ritter v. State, 403 So. 2d 154 (Ala. June 12, 1981) (on rehearing). pp. 13a - 31a, infra.

The State filed a petition for a writ of certiorari in this Court on August 6, 1981. Alabama v. Ritter, No. 81-247. Respondent Ritter filed a brief in opposition on or about September 11, 1981, in which he argued that the certiorari petition should be denied because the

Alabama Supreme Court's opinion in Reed v. State, 407 So. 2d 162 (Ala. 1981) (on rehearing), arguably indicated that that court's reversal of the conviction and sentence in this case rested on an independent and adequate state law ground.

On October 13, 1981, this Court entered an order which granted Alabama's petition for a writ of certiorari, vacated the judgment of the Alabama Supreme Court, and remanded this case to that court for further consideration in light of Reed v. State, supra. See p. 10a, infra.[8]

On December 11, 1981, the Alabama Supreme Court issued an opinion "unequivocably hold[ing] that our previous

---

[8]In briefs filed in the Alabama Supreme Court after the remand, the parties agreed that the purpose of the remand was to ascertain whether the Alabama Supreme Court's reversal of the conviction and sentence in this and other pre-Beck capital cases was based on federal constitutional grounds, on state law grounds, or on both.

opinion in this case was based upon federal constitutional grounds, not state law grounds." Ritter v. State, No. 77-798 (Ala. Dec. 11, 1981), pp. 6a - 9a, infra. On January 8, 1981, the Alabama Supreme Court denied Respondent's application for rehearing. Ritter v. State, supra, p. 5a, infra.

The State of Alabama then filed this petition for certiorari.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Presents Federal Questions which are the Same as or Similar to Three Questions on which Certiorari Has Already Been Granted in the Case of this Respondent's Co-defendant

Respondent Ritter is the co-defendant of John Louis Evans, the habeas petitioner (respondent in this Court) in Hopper v. Evans, No. 80-1714 (cert. granted June 22, 1981).[9] Ritter and Evans were partners in crime who were jointly indicted for a capital offense they committed, who entered identical pleas to that charge, who were jointly tried, and who were both convicted of that capital offense and sentenced to death for it. Evans and Ritter v. State, 361 So. 2d 654, 655-661, 663-666 (Ala. Cr.

---

[9]When certiorari was granted in the Evans case, that case was styled Britton v. Evans, No. 80-1714. Thereafter, the name of the case was changed to Hopper v. Evans pursuant to the automatic substitution provision of Rule 40.3.

App. 1977). Their convictions and death sentences were jointly affirmed in a single opinion by the Alabama Court of Criminal Appeals. Evans and Ritter v. State, supra, but thereafter the case became separated for reasons unrelated to the federal issues presented in this petition.[10]

---

[10]The cases became separated when the Alabama Supreme Court in Evans and Ritter v. State, 361 So. 2d 666 (Ala. 1978), affirmed Evans' conviction in its entirety but remanded Ritter's case to the Alabama Court of Criminal Appeals for consideration of whether a non-triggerman can be convicted of a capital offense and sentenced to death under Alabama law. The Court of Criminal Appeals answered in the affirmative in Ritter v. State, 375 So. 2d 266 (Ala. Cr. App. 1978). The Alabama Supreme Court affirmed that conclusion in Ritter v. State, 375 So. 2d 270 (Ala. 1979), holding that even though Evans was the triggerman, Ritter was equally guilty of the capital offense because Ritter knowingly sanctioned and facilitated the intentional killing and was an accomplice in it. 375 So. 2d at 274, pp. 57a -60a, infra. See n. 6 on p. 7 of this petition, above.

As a result of the procedural events described above, Evans' certiorari petition reached this Court before certiorari was granted in Beck v. Alabama, 444 U.S. 897 (Oct. 9, 1979), and it was denied in Evans

(footnote continued on next page)

On June 22, 1981, this Court granted Alabama's[11] petition for a writ of certiorari in Hopper v. Evans, No. 80-1714, to review four federal issues presented by that case. The first of those federal issues which this Court has agreed to review is verbatim identical to the first federal question presented in this case -- whether Beck v. Alabama, 447 U.S. 625 (1980), requires the reversal of all Alabama pre-Beck capital convictions regardless of the

---

(footnote 10 continued from preceding page)

v. Alabama, 440 U.S. 930 (Feb. 21, 1979). Ritter's certiorari petition, on the other hand, which reached this Court later, was granted, the Alabama Supreme Court's judgment vacated, and the case remanded for further consideration in light of the Beck decision in Ritter v. Alabama, 448 U.S. 903 (1980), pp. 48a - 49a, infra.

[11]The certiorari petition carries the name of the then Commissioner of Corrections (Britton) and the then warden at the prison where Evans was confined, but the real party in interest is, of course, the State of Alabama. See also, n. 9 on p. 19 of this petition, above.

facts in particular cases.[12] In addition, the three other federal questions presented in this case are similar to other federal issues which this Court will be deciding in Hopper v. Evans, supra. See pp. 28 - 46 of this petition, below. Certiorari should either be granted in this case for the same reasons it was granted in Hopper v. Evans, supra, or this petition should be held in abeyance until this Court issues its decision in the Evans case. See, pp. 46 - 48 of this petition, below.

---

[12]Five other pre-Beck Alabama capital cases which present this same issue are currently pending before this Court on petitions for certiorari. The other five cases are: Alabama v. Wright, No. 81-1287 (cert. filed Jan. 11, 1982); Alabama v. Daniels, No. 81-1397 (cert. filed Jan. 25, 1982); Alabama v. Bracewell, No. 81-1514 (cert. filed Feb. 8, 1982); Alabama v. Bryars, No. 81-1513 (cert. filed Feb. 8, 1982); and Alabama v. Hill, No. 81-1515 (cert. filed Feb. 8, 1982).

II.

The Decision Below Misinterprets and Misapplies this Court's Decision in Beck v. Alabama, 447 U.S. 625 (1980), and is Contrary to Related Decisions of this Court

The first federal question presented in this case is identical to the first question this Court granted certiorari to consider in Hopper v. Evans, No. 80-1714. That question concerns whether this Court's decision in Beck v. Alabama, 447 U.S. 625 (1980), requires the reversal of all Alabama pre-Beck capital convictions, including those in which there was absolutely no evidentiary basis for a lesser included offense instruction and in which the defendants admitted, confessed, and pleaded guilty to the capital offense. That federal issue is clearly presented by both the Evans and Ritter cases which stem from the same crime and joint trial.

The material facts as they relate to Respondent Ritter are set out on pp. 5 - 14 of this petition, above, and were well summarized by Justice Jones in his special opinion in the court below dissenting from the reversal of Ritter's conviction. As Justice Jones said:

> Aided by the Court of Criminal Appeals' summary of the evidence in Evans and Ritter v. State, 361 So. 2d 654, 656-661 (Ala. 1977), and Ritter v. State, 375 So. 2d 266, 267 (Ala. 1978), and by this Court's opinion, after return of the case from remand (Ritter v. State, 375 So. 2d 270, 273 (Ala. 1979)), I have again made an independent review of the entire record in a painstaking search for the slightest hint that Ritter was restricted, or otherwise influenced, in the conduct of his defense by the omnipresence of the statutory edict that the jury either sentence him to die or set him free. I find none.
>
> Indeed, to the minutest detail, the State's proof of each and every element of the capital offense is verified and amplified by Ritter's own testimony. In addition to pleading guilty of the capital crime as charged, he took the witness stand -- against advice of counsel and following the

> trial court's thorough admonition as to his constitutional rights -- and recounted in great detail his and his companion's trail of crime leading up to and including the murder of the pawnshop proprietor during a planned armed robbery of the victim, agreeing in advance to kill the robbery victim if necessary.
>
> The posture of this record affirmatively precludes any reasonable hypotheses other than that of Defendant's guilt of the capital crime as charged in the indictment. Where, as here, the voluntary testimony of a mentally competent defendant affirmatively eliminates any possible inference which would support a finding of guilty of a noncapital lesser included offense, we are constrained to hold that the unconstitutional provision excised by Beck visited no impermissible restraint upon the Defendant in the conduct of his defense, including his right to actively contest the charges against him.

Ritter v. State, 403 So. 2d 154, 156-157 (Ala. June 12, 1981) (on rehearing), (opinion of Jones, J., joined by Maddox and Adams, J.J., concurring in part and

dissenting in part), pp. 23a - 26a, infra.[13]

The facts of this case present with equal clarity the first federal question which this Court granted certiorari to review in Hopper v. Evans, No. 80-1714. In that case the Fifth Circuit interpreted this Court's decision in Beck v. Alabama, 447 U.S. 625 (1980), to require the reversal of all Alabama pre-Beck capital convictions regardless of the facts and without any showing or even allegation that the preclusion clause struck down in Beck harmed

---

[13]While concluding that Respondent Ritter was entitled to a new sentence hearing to be held under the procedures set out in Beck v. State, 396 So. 2d 645 (Ala. 1980), Justices Jones, Maddox, and Adams disagreed with the majority's decision that Beck v. Alabama, 447 U.S. 625 (1980), required that Ritter's conviction be reversed. Those three members of the court below would have affirmed the conviction, and they dissented from the decision for that reason. See, pp. 8a - 9a and 26a - 27a, infra.

Alabama's position is that Respondent is neither entitled to a new sentence hearing nor a new trial.

or prejudiced a particular defendant in any way. Evans v. Britton, 628 F. 2d 400 (5th Cir. 1980), opinion extended on rehearing, 639 F. 2d 221 (1981), certiorari granted, No. 80-1714 (U.S., June 22, 1981).

That holding misinterprets this Court's Beck decision and is in conflict with related decisions of this Court for the reasons discussed in the certiorari petition in that case. See, Petition for Certiorari, Hopper v. Evans, No. 80-1714 (U.S. Oct. Term, 1981), pp. 15-44.

Now, in this case, a majority of the court below has reached the same holding as the Fifth Circuit in a case in which the material facts are identical. Moreover, the court below expressly relied on the Fifth Circuit's erroneous decision in Evans v. Britton, supra, in reaching its decision. Ritter v. State, No. 77-798 (Ala. Dec. 11, 1981) (on second remand), slip op. at 2, p. 7a, infra; Ritter v. State, 403 So. 2d

154 (Ala. June 12, 1981) (on first remand), p. 14a, infra.

The decision below misinterprets this Court's Beck decision and is in conflict with related decisions of this Court for the same reasons discussed on pp. 15-44 of the State's certiorari petition in Hopper v. Evans, supra, and certiorari should be granted in this case for the same reason it was granted in that case.[14]

III.

The Decision Below is Contrary to Decisions of this Court Concerning Harm and Prejudice as a Prerequisite to a Due Process Fundamental Fairness Claim and as a Prerequisite to a Reversal When a Constitutional Violation is Established

The decision below is not based on any finding that the jury which convicted

---

[14]An alternative to granting certiorari in this case would be for the Court to hold this certiorari petition in abeyance until it decides Hopper v. Evans, No. 80-1714. See, pp. 46 - 48, of this petition, below.

Respondent would have been instructed on any lesser included non-capital offense had it not been for the preclusion clause, nor is the decision below based on any finding that the mere existence of the preclusion clause actually affected Respondent's self-destructive legal strategy. Instead, by misconstruing Beck v. Alabama, 447 U.S. 625 (1980), and blindly following the Fifth Circuit's erroneous decision in Evans v. Britton, 628 F. 2d 400 (5th Cir. 1980), opinion extended, 639 F. 2d 221 (1981), cert. granted, No. 80-1714 (U.S., June 22, 1981), the court below reached a decision which is based implicitly, though indisputably, on a holding that harm and prejudice are not necessary to a fundamental fairness claim based on the Due Process Clause of the United States Constitution.

The preclusion clause did not harm or prejudice Respondent because the jury which convicted him would not have been instructed

on any lesser included non-capital offense even had the preclusion clause never existed. Under Alabama law, a defendant is entitled to a lesser included offense instruction only if there is some evidentiary basis for it -- some basis in the evidence from which the jury could reasonably conclude that the defendant is innocent of the higher offense but guilty of some specific lesser offense. See, e.g., Beck v. Alabama, 447 U.S. at 630 n. 5, quoting Fulghum v. State, 291 Ala. 71, 75, 277 So. 2d 886, 890 (1973) (a lesser offense instruction should be given if "there is any reasonable theory from the evidence which would support the position."); Harris v. State, 398 So. 2d 777, 778-779 (Ala. Cr. App.), cert. denied, 398 So. 2d 780 (Ala. 1981); Gray v. State, 394 So. 2d 92, 94-95 (Ala. Cr. App.), cert. denied, 399 So. 2d 840 (Ala. 1981).

In this case, "[t]hat there was absolutely no evidence of Ritter's guilt of a lesser included offense is plain..." Ritter v. State, 403 So. 2d 154, 158 (Ala. 1981) (on rehearing) (Maddox, J., joined by Jones and Maddox and Adams, J.J.). Nor was there any evidence that Respondent's defense was influenced or affected in any way by the existence of the preclusion clause. As Justice Jones of the court below stated:

> Aided by the Court of Criminal Appeals' summary of the evidence in Evans and Ritter v. State, 361 So. 2d 654, 656-661 (Ala. 1977), and Ritter v. State, 375 So. 2d 266, 267 (Ala. 1978), and by this Court's opinion, after return of the case from remand (Ritter v. State, 375 So. 2d 270, 273 (Ala. 1979)), I have again made an independent review of the entire record in a painstaking search for the slightest hint that Ritter was restricted, or otherwise influenced, in the conduct of his defense by the omnipresence of the statutory edict that the jury either sentence him to die or set him free. I find none.

Ritter v. State, 403 So. 2d 154, 156 (Ala. 1981) (on rehearing) (Jones, J., joined by

Maddox and Adams, J.J.), pp. 23a - 24a, infra.

Therefore, all three members of the court below who addressed the point found that the preclusion clause did not operate in Respondent's trial nor did it influence his trial strategy or defense in any way. The six-member majority below did not disagree with that finding. Instead, the majority's decision to reverse the case was based on its interpretation of Beck v. Alabama, 447 U.S. 625 (1980), an interpretation influenced by the Fifth Circuit's decision in Evans v. Britton, supra. By holding that the federal constitution requires that Respondent's conviction and sentence be overturned even though that Respondent was not harmed or prejudiced in any way by the preclusion clause, the court below contravened several decisions of this Court.

This Court has held that the Fourteenth Amendment guarantee of due process is, in essence, a guarantee of fundamental fairness. E.g., Ingraham v. Wright, 430 U.S. 651, 675 (1977); Donnelly v. De Christoforo, 416 U.S. 637, 642 (1974). Since a defendant cannot logically be said to have been treated unfairly by something which did not affect him, the requirement of harm and prejudice is inherent in the very concept of due process fundamental fairness. In Beck v. Washington, 369 U.S. 541 (1962), the due process claim of a defendant who could not prove that he had been actually prejudiced by the voluminous pretrial publicity about his case was rejected, because:

> While this Court stands ready to correct violations of constitutional rights, it also holds that "it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and

> that it be sustained not as a matter of speculation but as a demonstrable reality." United States ex rel. Darcy v. Handy, 351 U.S. 454, 462, 76 S. Ct. 965, 100 L. Ed. 1331 (1956). This burden has not been met.

Id., at 558. Likewise, in Donnelly v. De Christoforo, 416 U.S. 637 (1974), this Court held that improper prosecutorial remarks to the jury do not violate due process unless the remarks are "sufficiently prejudicial." Id., at 639. Whether the defect be one of omission or commission, faulty jury instructions violate due process fundamental fairness only if they are known to have caused prejudice. The failure to instruct on an essential element of the crime in Henderson v. Kibbe, 431 U.S. 145 (1977), did not violate due process because the possibility of prejudice from that omission was, "too speculative to justify the conclusion that constitutional error was committed," id., at 157; and, in Cupp v. Naughten, 414 U.S. 141 (1973), this Court

ruled that the giving of an instruction that was "undesirable, erroneous, or even 'universally condemned,'" id., at 146, did not violate due process absent actual prejudice. Id., at 147.

Prejudice is a necessary element of a due process claim concerning pre-indictment delay. United States v. Lovasco, 431 U.S. 783, 789-790 (1977); United States v. Marion, 404 U.S. 307, 325-326 (1971) ("the real possibility of prejudice inherent in any extended delay" is not sufficient, and defendants must "demonstrate actual prejudice"). Prejudice is also a prerequisite of a due process claim involving the suppression of exculpatory evidence, as United States v. Agurs, 427 U.S. 97 (1976), makes clear. Therefore, the decisions of this Court establish that a finding of harm and can be prejudice is an essential component of a due process fundamental fairness claim.

In addition, decisions of this Court establish that even where some constitutional right is violated, a related conviction should not be set aside if the violation did not contribute to the conviction. This Court has recognized "the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests," United States v. Morrison, 101 S. Ct. 665, 668 (1981), and it has ruled accordingly. See, e.g., id., at 667-669 (remedy for violation of right to counsel dependent on extent of harm caused by the infringement); United States v. Blue, 384 U.S. 251, 255 (1966) (remedy for violation of Fifth Amendment is exclusion of statement, not barring the prosecution); Brady v. Maryland, 373 U.S. 83, 88-90 (1963) (remedy for suppression of evidence material only to sentencing is limited to ordering a

new sentence proceeding). Even where a constitutional violation stems from "the egregious behavior of the governmental agents," no remedy is to be imposed on direct or collateral appeal in the absence of harm. United States v. Morrison, 101 S. Ct. at 669.

Accordingly, the decision below is contrary both to this Court's decisions requiring harm and prejudice as a component of a fundamental fairness due process claim and to this Court's decisions holding that even where a constitutional violation is established, a related but non-affected conviction should not be overturned.

The harm and prejudice question presented by this case is virtually identical to the second federal question which this Court granted certiorari in Hopper v. Evans, No. 80-1714 (certiorari granted June 22, 1981), to review. The only difference is that in the Evans case the

conviction was set aside in a federal habeas corpus proceeding whereas the conviction in this case was set aside on direct appeal by a state court heavily influenced by the Evans habeas decision.

IV.

The Decision Below is Either Contrary to Decisions of this Court Concerning the Effect of Guilty Pleas, or It Presents an Important Federal Issue Concerning the Effect of Guilty Pleas Which this Court Has Not Yet Addressed But Should

The fourth federal question presented by this case concerns the effect of Ritter's guilty plea on his challenge to validity of his conviction. In the trial court, Ritter pleaded guilty to the capital charge for which he was convicted, and his guilty plea was accepted and entered in the official minutes of the court. (Tr. 21, 27, 29, 48-60, 207-208, 252, 283, 345-348); See,

Ritter v. State, 403 So. 2d 154, 157 (Ala. June 12, 1981) (on rehearing) (Jones, J., joined by Maddox and Adams, J.J., concurring in part and dissenting in part), p. 24a, infra.

Under Alabama law, when a defendant in a capital case pleads guilty, the case against him is still submitted to a jury, since only a jury can sentence a defendant to death under Alabama law. Prothro v. State, 370 So. 2d 740 (Ala. Cr. App. 1979). The Alabama Court of Criminal Appeals has held that notwithstanding the necessity of presenting every capital case to a jury, a guilty plea in a capital case still has the effect of waiving all non-jurisdictional defects in the case. Graham v. State, 403 So. 2d 275, 284 (Ala. Cr. App. 1980), writ quashed, 403 So. 2d 286 (Ala. 1981). The Alabama Supreme Court quashed its previously granted writ of certiorari in the Graham

case because it agreed with the Court of Criminal Appeals' holding in that case. See, Lane v. State, No. 80-803 (Ala. 1982), slip op. at 2, pp. 75a - 76a, infra.

Indeed, the Alabama Supreme Court in its pre-Beck opinion in this very case, recognized that while a capital case guilty plea is not accepted in lieu of a trial under Alabama law, such a guilty plea does as a matter of state law waive any and all non-jurisdictional defects occurring before or after the plea is entered. The court held that Ritter did enter a guilty plea, that that plea eliminated any possibility of injury to Ritter from any defect in the trial court's instructions to the jury, and that the guilty plea constituted a waiver of any defect in those instructions. Ritter v.

State, 375 So. 2d 270, 273, 276 (Ala. 1979), pp. 53a - 54a and 68a - 70a, infra.[15]

The problem is that after this case was returned to it on remand from this Court, Ritter v. Alabama, 448 U.S. 903 (1980) (first remand), the court below misinterpreted Beck v. Alabama, 447 U.S. 625 (1980), to require reversal in this case in spite of Ritter's guilty plea. Ritter v. State, 403 So. 2d 154 (Ala. 1981) (after first remand). The court below's misapplication of Beck to

---

[15]The Alabama Supreme Court did say in Ritter v. State, 375 So. 2d at 275, p. 70a, infra, that instead of accepting Ritter's guilty plea the trial judge set the matter for presentation to a jury. That simply means that guilty pleas are not accepted in lieu of a jury verdict in Alabama capital cases. It does not mean that a capital guilty plea is given no effect under Alabama law; the Alabama Supreme Court recognized in its other statements in that Ritter opinion that Alabama law does give effect to capital case guilty pleas. 375 So. 2d at 276, p. 68a - 70a. Carnes, Alabama's 1981 Capital Punishment Statute, 42 Ala. Law. 456, 477-480 (July, 1981); see generally, Lane v. State, supra, pp. 73a - 82a, infra.

this case was based primarily on that court's misreading of the "in every case" language in this Court's Beck opinion. See pp. 23 - 28 of this brief, above, and Brief for Petitioners, Hopper v. Evans, No. 80-1714. (U.S., cert. granted June 22, 1980), at 14-21.

The court below's misapplication of Beck to this case was also based in part on the court below's erroneous conclusion that as a matter of federal law a guilty plea could not waive non-jurisdictional defects in a case in which the death penalty was imposed. Lane v. State, No. 80-803 (Ala. Feb. 5, 1982), pp. 73a - 82a, infra, involved a pre-Beck capital case in which the defendant pleaded guilty to the capital offense and received a sentence of life imprisonment with parole. The Alabama Supreme Court unanimously held that the conviction and sentence in that case was not

affected by this Court's Beck decision or that court's Ritter decision, and was due to be affirmed.

Since there was a guilty plea in Ritter as well as in Lane, the Alabama Supreme Court felt compelled in its Lane opinion to address the apparently inconsistent results in the two cases. The Alabama Supreme Court explained that all nine of its members agree that, as this Court's opinion in Brady v. United States, 397 U.S. 742 (1970), recognizes, a guilty plea in a capital case in which the death penalty is not imposed waives all non-jurisdictional defects. Lane v. State, supra, slip op. at 2-5, pp. 76a-81a, infra. That is why the pre-Beck capital conviction in Lane was due to be affirmed -- the Lane defendant had been sentenced to life imprisonment without parole instead of death.

The Alabama Supreme Court went on to explain in its Lane opinion that the

conviction in Ritter (this case) had been reversed notwithstanding Ritter's guilty plea because, "[t]here is disagreement on this Court on whether a plea of guilty in a capital case when the death penalty is imposed also waives all non-jurisdictional defects." Lane v. State, supra, slip op. at 2 n. 1, p. 76a, infra (emphasis in original). A six-member majority of the court below believes that as a matter of federal constitutional law a guilty plea does not waive non-jurisdictional defects in those capital cases in which the death penalty is imposed. That is why this case, unlike the Lane case, was reversed notwithstanding the valid guilty plea. Compare Lane v. State, supra, slip op. at 2 & n. 1, p. 76a, infra, with Ritter v. State, No. 77-798 (Ala. Dec. 11, 1981) (after second remand), pp. 6a - 9a, infra (explaining that the reversal in this case is based purely on federal constitutional grounds).

Therefore, the decision of the court below in this case, as subsequently explained by that court in its Lane opinion, presents an important federal constitutional issue concerning the effect of guilty pleas in capital cases in which the death penalty is imposed. The issue is whether the non-jurisdictional defect waiver rule recognized in Brady v. United States, 397 U.S. 742 (1970), and in other decisions of this Court, applies to capital cases in which the defendant after entering a valid guilty plea is sentenced to death. To the extent that the court below's decision of this federal constitutional issue is not in conflict with this Court's decision in Brady v. United States, 397 U.S. 742 (1970), so as to fall within the second part of Rule 17.1(c), then the court below has decided an important question of federal law which has not been, but should be, decided by this Court within the meaning of the first part of Rule

17.1(c). Either way, this Court should grant certiorari to review the federal question.

IN THE ALTERNATIVE, THIS PETITION SHOULD NOT BE RULED ON UNTIL THIS COURT DECIDES THE EVANS CASE

This case presents four important federal questions. One of those questions is identical to a federal question for which certiorari has been granted in Hopper v. Evans, No. 80-1714 (certiorari granted June 22, 1981) -- the proper interpretation of Beck v. Alabama, 447 U.S. 625 (1980). The second and third federal questions presented by this case, which concern the harm and prejudice prerequisite, are virtually identical to the harm and prejudice question included in the grant of certiorari in Hopper v. Evans, supra. The fourth federal question presented by this case, which concerns the effect of a guilty

plea entered in a capital case in which the defendant is sentenced to death, is similar to the guilty plea question included in the grant of certiorari in Hopper v. Evans, supra.

Not only are the federal questions presented in this case and in Hopper v. Evans, supra, the same or similar, but the material facts are as well. This Respondent and Evans committed the same crime, entered the same plea, pursued the same self-destructive legal strategy, were jointly tried, jointly convicted, and jointly sentenced to death. In fact, the phrase "the defendants" in Question Presented no. 1 in the Hopper v. Evans petition and in this petition refers to this Respondent and Evans.

Two co-defendants who committed the same crime, who were convicted by the same jury and were sentenced by the same court on the same day, and whose cases present the

same or similar federal constitutional issues should have those issues decided in the same way. Therefore, if this Court does not grant certiorari in this case before it decides Hopper v. Evans, supra, then this petition should be held until a decision is issued in that case.[16]

---

[16]The same is true about the five other cases listed in footnote 12 on p. 22 of this petition, above. If certiorari is not granted in those cases before Hopper v. Evans, supra, is decided, then the petition in each case should be held pending the outcome in Evans.

CONCLUSION

This Court should grant certiorari to decide the important federal questions presented by this case. In the alternative, this Court should hold this petition in abeyance until it issues a decision in Hopper v. Evans, No. 80-1714 (U.S., cert. granted June 22, 1981).

Respectfully submitted,

Charles A. Graddick rea

CHARLES A. GRADDICK
ATTORNEY GENERAL

Edward E. Carnes

EDWARD E. CARNES
ASSISTANT ATTORNEY
ATTORNEY GENERAL

Counsel of Record

Address of Counsel:

Asst. Alabama Atty. Gen. Edward E. Carnes
250 Administrative Building
64 N. Union Street
Montgomery, Alabama 36130

CERTIFICATE OF SERVICE

I, Edward E. Carnes, a member of the Bar of the Supreme Court of the United States, do hereby certify that on this the 26th day of February, 1982, I did serve copies of this petition and the accompanying appendix on Respondent, by placing in the United States Mail, first-class postage prepaid, three copies properly addressed to the counsel of record for Respondent, as follows:

Honorable John R. Carroll
1001 South Hull Street
Montgomery, Alabama 36104

I further certify that I have served all parties required to be served.

Ed Carnes

EDWARD E. CARNES
ASSISTANT ALABAMA
ATTORNEY GENERAL

Appendix

Office - Supreme Court, U.S.
FILED
FEB 27 1982
ALEXANDER L. STEVAS
CLERK

81-1600

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF ALABAMA,

Petitioner

v.

WAYNE EUGENE RITTER,

Respondent

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI

TO THE ALABAMA SUPREME COURT

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

EDWARD E. CARNES
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

Counsel of Record

250 Administrative Bldg.
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

ATTORNEYS FOR PETITIONER

TABLE OF APPENDICES

App. No.	Pg. No.	Description
A	1a	February 1, 1982 Alabama Supreme Court Judgment Order (After Second Remand)
B	5a	January 8, 1981 Alabama Supreme Court Order Denying Rehearing (After Second Remand)
C	6a	December 11, 1981 Alabama Supreme Court Opinion (After Second Remand)
D	10a	October 13, 1981 United States Supreme Court (Second) Remand Order
E	11a	June 12, 1981 Alabama Supreme Court Order Denying Rehearing (After First Remand)
F	13a	June 12, 1981 Alabama Supreme Court Opinion On Rehearing (After First Remand)
G	32a	May 8, 1981 Alabama Supreme Court Judgment Order (After First Remand)

TABLE OF APPENDICES (Con't)

App. No.	Pg. No.	Description
H	34a	May 8, 1981 Alabama Supreme Court Opinion Before Rehearing (After First Remand)
I	48a	June 30, 1980 United States Supreme Court (First) Remand Order
J	50a	July 6, 1979 Opinion of the Alabama Supreme Court (Before Remand)
K	73a	February 5, 1982 Opinion of the Alabama Supreme Court in the case of Lane v. State

APPENDIX A

FEBRUARY 1, 1982

THE STATE OF ALABAMA--JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1981-82

77-798

EX PARTE: WAYNE EUGENE RITTER

(In Re: Wayne Eugene Ritter vs. State of Alabama)

ORDER

IT IS ORDERED that the order entered in this cause on December 11, 1981, be, and the same is hereby, amended to read as follows:

WHEREAS, the Court of Criminal Appeals, on October 25, 1977, affirmed the judgment of the circuit court in this cause; and

WHEREAS, this Court, on May 19, 1978, reversed the judgment of the Court of

Criminal Appeals as to Ritter, and remanded the cause to that Court for further proceedings therein; and

WHEREAS, the Court of Criminal Appeals, on August 9, 1978, affirmed the judgment of the circuit court after remandment by this Court; and

WHEREAS, this Court, on July 6, 1979, affirmed the judgment of the Court of Criminal Appeals; and

WHEREAS, on June 30, 1980, this cause was remanded to this Court by the Supreme Court of the United States for further consideration in light of Beck v. State, (M.S. December 19, 1980) 396 So. 2d 645, Ala. 1980.

WHEREAS, this Court, on May 8, 1981, on remand of this cause to this Court by the United States Supreme Court, reversed the judgment of the Court of Criminal Appeals and remanded the cause to that

Court with directions to grant a new trial; and

WHEREAS, on remand from the Supreme Court of Alabama, the Court of Criminal Appeals on June 23, 1981, reversed the judgment of the circuit court and remanded the cause for a new trial under the authority of Beck vs. Alabama, 447 U. S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d (1980), and Beck vs. State, (M.S. December 19, 1980) 396 So. 2d 645, (Ala.) 1980.

WHEREAS, the Supreme Court of the United States, on October 13, 1981, vacated the judgment of this Court and remanded the cause to this Court for further consideration, and issued its mandate thereon to this Court on October 20, 1981; and

WHEREAS, the Court of Criminal Appeals on October 29, 1981, recalled the certificate of judgment entered by that Court on June 23, 1981; and

WHEREAS, on further consideration of this cause pursuant to the mandate of October 20, 1981, the majority of this Court is of the opinion that the judgment entered in the cause by this Court on May 8, 1981, should be reentered in this cause.

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED that the judgment of the Court of Criminal Appeals, entered in that Court on June 23, 1981, should be reentered in the cause, and it is hereby ordered that the certificate of final judgment heretofore issued by the Court of Criminal Appeals be reissued to the Circuit Court of Mobile County, Alabama.

PER CURIAM.
TORBERT, C.J., FAULKNER, SHORES, EMBRY AND BEATTY, JJ., CONCUR.
ALMON, J., CONCURS IN THE RESULT.
MADDOX, JONES AND ADAMS, JJ., CONCUR IN PART AND DISSENT IN PART.

[Clerk's certification omitted in printing]

APPENDIX B

JANUARY 8, 1982

THE STATE OF ALABAMA--JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1981-82

77-798

IN THE MATTER OF:

WAYNE EUGENE RITTER

VS.

STATE OF ALABAMA

IT IS ORDERED that the application for rehearing in the nature of a request for clarification filed on December 28, 1981, be, and the same is hereby, overruled. NO OPINION.

ALL THE JUSTICES CONCUR.

[Clerk's certification omitted in printing]

APPENDIX C

DECEMBER 11, 1981

THE STATE OF ALABAMA--JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1981-82

Wayne Eugene Ritter

77-798 v.

State of Alabama

ON REMAND FROM THE

UNITED STATES SUPREME COURT

PER CURIAM.

The United States Supreme Court has remanded this case to this Court for further consideration in light of Reed v. State, Ala., [MS. June 12, 1981] ___ So. 2d ___ (1981), extended on rehearing (August 28, 1981), motion for clarification denied (October 7, 1981).

On June 12, 1981, this Court extended its initial opinion in the present case to explain that our reversal and remand was compelled by the decision of the United States Supreme Court in Beck v. Alabama, ___ U.S. ___, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), and Beck v. State, Ala., 396 So. 2d 645 (1980), and was "consistent with the interpretation of that decision" reached by the Fifth Circuit in Evans v. Britton, ___ F. 2d ___ [March 19, 1981] (1981). We adopt our previous opinion and now unequivocally hold that our previous opinion in this case was based upon federal constitutional grounds, not state law grounds. Moreover, our opinion in Reed v. State, supra, rather than altering our previous decision in this case explained further why we felt compelled by federal constitutional considerations to reverse the conviction in this case.

ORIGINAL OPINION EXTENDED.

REVERSED AND REMANDED.

Tobert, C. J., Faulkner, Shores, Embry and Beatty JJ., concur.

Almon, J., concurs in the result.

Maddox, Jones and Adams, JJ., concur in part and dissent in part.

MADDOX, JONES, AND ADAMS, JJ. (Concurring in part and dissenting in part).

We agree that, on original deliverance, when the Justices ordered a new trial in this cause, they were of the opinion that the federal constitution, as interpreted by the Supreme Court of the United States in Beck v. Alabama, 447 U. S. 625 (1980), mandated a new trial as to both the issue of guilt and the issue of sentencing.

We still hold the view which we expressed in the original deliverance of the opinion in this cause, filed on May 8, 1981, and published under the rehearing

date of June 12, 1981, that Beck v. Alabama, supra, did not mandate a new trial as to the issue of guilt, only as to the issue of sentencing. See our special opinion, concurring in part and dissenting in part, in Ritter v. State, 403 So. 2d 154 (Ala. 1981).

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. 81-247

Alabama,

Petitioner

v.

Wayne Eugene Ritter

ON WRIT OF CERTIORARI to the Supreme Court of Alabama.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated, and that this cause is remanded to the Supreme Court of Alabama for further consideration in light of Reed v. State, ___ So. 2d ___ (Ala. 1981).

October 13, 1981

[Clerk's attestation omitted in printing]

APPENDIX E

June 12, 1981

THE STATE OF ALABAMA--JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1980-81

77-798

IN THE MATTER OF:

WAYNE EUGENE RITTER

VS.

STATE OF ALABAMA

AFTER REMAND BY
UNITED STATES
SUPREME COURT

IT IS ORDERED that the application for rehearing filed in the above cause on May 18, 1981, be, and the same is hereby, denied. OPINION EXTENDED.

SHORES, J.
FAULKNER, ALMON, EMBRY AND BEATTY, JJ., CONCUR IN DECISION AND IN DENIAL OF REHEARING.
TORBERT, C.J., CONCURS SPECIALLY IN DECISION, WITH OPINION, AND CONCURS IN DENIAL OF REHEARING.
JONES, J., WITH WHOM MADDOX AND ADAMS, JJ., CONCUR, CONCURS IN PART AND DISSENTS IN PART IN DECISION,

WITH OPINION.
MADDOX, J., WITH WHOM JONES AND ADAMS, JJ., CONCUR, CONCURS SPECIALLY IN DENIAL OF REHEARING, WITH OPINION.

[Clerk's certification omitted in printing]

APPENDIX F

JUNE 12, 1981

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1980-81

77-798

IN THE MATTER OF:

Wayne Eugene Ritter

v.

State of Alabama

After Remand by the United States Supreme Court

On Application for Rehearing

SHORES, JUSTICE.

The application for rehearing is denied. The opinion of the Court dated May 8, 1981 is extended so that the opinion shall read as follows:

Reversed and remanded to the Court of Criminal Appeals with directions to that Court to grant a new trial under the

authority of Beck v. Alabama, ___ U.S. ___, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), and Beck v. State, 396 So. 2d 645 (Ala. 1980).

We believe this result is compelled by the decision of the Supreme Court of the United States in Beck and is consistent with the interpretation of that decision reached by the Court of Appeals for the Fifth Circuit in Evans v. Britton, ___ F. 2d ___ [March 19, 1981] (1981), which involved Ritter's partner in this crime.

REVERSED AND REMANDED; APPLICATION FOR REHEARING DENIED; OPINION EXTENDED.

Faulkner, Almon, Embry, and Beatty, JJ., concur in decision and in denial of rehearing.

Torbert, C. J., concurs specially in decision, with opinion, and concurs in denial of rehearing.

Jones, J., with whom Maddox and Adams, JJ., concur, concurs in part and dissents in part in decision, with opinion.

Maddox, J., with whom Jones and Adams, JJ., concur, concurs specially in denial of rehearing, with opinion.

TORBERT, CHIEF JUSTICE (Concurring specially).

Although I agree with the result reached by the majority, I do not wish to be understood as being in favor of abolishing or otherwise modifying the traditional rule that a jury instruction on a lesser included offense is appropriate if, and only if, there is evidence of a lesser included offense. See, Roberts v. Louisiana, 428 U.S. 325 (1976).

JONES, JUSTICE (Concurring in part and dissenting in part in decision):

The majority of the Court, by directing that the Court of Criminal Appeals reverse the judgment of conviction and sentence and remand the case for a new trial, has mandated that all pre-Beck death penalty convictions and sentences be set aside and new trials ordered. As to the judgment of conviction in the instant case, I respectfully dissent.

This death penalty case was remanded by the United States Supreme Court for this Court's reconsideration in light of Beck v. Alabama, ___ U.S. ___, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980).

Beck declared unconstitutional the application of the provision of the Alabama Death Penalty Act which precludes the trial court from instructing the jury on lesser included offenses, where, as was the case in Beck, the evidence is

susceptible of a finding of such an offense. Here, as in Beck, the jury was instructed, pursuant to Alabama Code 1975, § 13-11-2(a), to return either a verdict of guilty with a sentence of death or a verdict of not guilty, precluding the option of finding the defendant guilty of a noncapital offense.

Unlike Beck, Ritter's evidence of record fails to support any finding other than a verdict adjudging the Defendant guilty of the capital offense as charged. Unquestionably, had the death penalty statute not included the "preclusion of lesser included offenses" clause (thus conforming the statute to Beck on remand ([MS. December 19, 1980] ___ So. 2d ___ (Ala. 1980)), Ritter would not have been entitled to a jury instruction on lesser included offenses.

As Ritter's counsel suggests, however, this does not end our inquiry;

it merely establishes one of the premises upon which the ultimate dispositive issue must be answered. Another essential premise is the further objective fact that the death penalty statute, under which Ritter was tried, convicted, and sentenced to die, did include the "preclusion" clause, the operative effect of which may have unduly restricted Ritter's defense with respect to proof of facts and circumstances sufficient to invoke lesser included offenses instructions.

Stated another way, whether the instant record would have entitled Ritter to a lesser included offenses instruction (thus offering the jury a third optional finding) is not the issue; rather, the issue is whether Ritter was unconstitutionally denied the benefit of a trial under a valid death penalty statute permitting evidence which would warrant a jury verdict of guilty of a lesser

included offense under appropriate instructions.

The State summarizes its argument as follows:

> "There was absolutely no evidentiary basis at Ritter's trial for any lesser included offense instruction. There was no evidentiary dispute about any element of the capital offense, because Ritter confessed to and admitted every element of the capital offense, and he did so both before and during the trial. In addition, Ritter pleaded guilty and his valid guilty plea was accepted by the trial court and entered in the official judgment entry and minutes of the court. The trial court did submit the case to a jury since only a jury can sentence a capital defendant to death, but Ritter's voluntary guilty plea still conclusively establishes his guilt and removes any factual issue from the case."

Ritter's "fundamental fairness" argument is premised on the proposition that the "preclusion" clause operated to bar or to discourage alternative trial strategy, including the offering of

evidence which would support a noncapital offense verdict. He argues:

> " . . . The very existence of the provision precluding jury consideration of lesser included offenses would almost invariably affect a capital defendant's strategy, the presentation of evidence and even, as in this case whether actively to contest the charges against him. It is clearly constitutionally impermissible for the state to tell a capital defendant that he may not present evidence of lesser included offenses at trial, and then seek to prevent the defendant from complaining of this unconstitutional prohibition on the grounds that he failed to present such evidence."

Although I disagree with the majority's reversal of Ritter's conviction, I reject the State's contention as an overly simplistic approach. Surely, the presence of the factual issue of lesser included offenses in Beck does not limit the application of its holding to only those cases in which the evidence of record supports such a

finding. We do not read Beck as suggesting that a pre-Beck capital defendant was required to so posture his trial strategy as to affirmatively invoke the application of the lesser included offense doctrine, or failing to do so, forfeit the protective cloak of Beck.

While the State, in my opinion, has interpreted Beck far too narrowly, I believe, as to the judgment of conviction, Ritter's counsel has given it an overly broad interpretation.[1] Although his argument is persuasive and, undoubtedly, one that ordinarily will prevail, I do not read Beck, nor the Supreme Court's remand of the instant case, as mandating reversal in every case in which the defendant has been convicted and sentenced to death under Alabama's death penalty statute.

---

[1]As shown later in this opinion, I accept defense counsel's contention as to the judgment of sentence.

I would hold that the test for answering the issue here presented for our consideration is whether the evidence of record is susceptible of any reasonable hypothesis giving rise to the application of the lesser included offense doctrine. Because such hypotheses may arise from either the presence or the lack of evidence adduced at trial, this test cannot be met unless the record of trial affirmatively precludes every reasonable hypothesis other than that of the Defendant's guilt of the capital offense as charged. Any reasonable doubt must be resolved in favor of granting the defendant a new trial.

Therefore, on review of this case, and other pre-Beck capital convictions henceforth, I would apply the following objective standard: The conviction is affirmable if, and only if, a composite of the testimony, after indulging every

reasonable doubt in favor of the defendant, affirmatively reveals a clear, unequivocal and undisputed chain of events comprising all of the elements of the capital offense to the total exclusion of any reasonable fact or circumstance supportive of a lesser included offense. The inference of such a hypothesis necessarily arises unless the proof of record establishes defendant's guilt of the capital offense fully and undisputably, affirmatively precluding every reasonable inference to the contrary.

Applying this standard of review to the instant case, I am unable to perceive from the proof of record before us any possible hypothesis other than that of the Defendant's guilt of the capital offense as charged in the indictment.

Aided by the Court of Criminal Appeals' summary of the evidence in Evans

and Ritter v. State, 361 So. 2d 654, 656-661 (Ala. 1977), and Ritter v. State, 375 So. 2d 266, 267 (Ala. 1978), and by this Court's opinion, after return of the case from remand (Ritter v. State, 375 So. 2d 270, 273 (Ala. 1979)), I have again made an independent review of the entire record in a painstaking search for the slightest hint that Ritter was restricted, or otherwise influenced, in the conduct of his defense by the omnipresence of the statutory edict that the jury either sentence him to die or set him free. I find none.

Indeed, to the minutest detail, the State's proof of each and every element of the capital offense is verified and amplified by Ritter's own testimony. In addition to pleading guilty of the capital crime as charged, he took the witness stand--against advice of counsel and following the trial court's thorough

admonition as to his constitutional rights--and recounted in great detail his and his companion's trail of crime leading up to and including the murder of the pawnshop proprietor during a planned armed robbery of the victim, agreeing in advance to kill the robbery victim if necessary.

The posture of this record affirmatively precludes any reasonable hypotheses other than that of Defendant's guilt of the capital crime as charged in the indictment. Where, as here, the voluntary testimony of a mentally competent defendant affirmatively eliminates any possible inference which would support a finding of guilty of a noncapital lesser included offense, we are constrained to hold that the unconstitutional provision excised by Beck visited no impermissible restraint upon the Defendant in the conduct of his defense,

including his right to actively contest the charges against him.

To hold otherwise would be tantamount to allowing the Defendant, by way of a new trial, to raise factual issues wholly contrary and in direct contradiction to those established by his own sworn testimony in the original trial. His option to so testify in the original trial cannot be said to have been impermissibly encouraged by the constitutionally invalid "preclusion" clause.[2]

While I would affirm the judgment of conviction, I, nonetheless, would reverse the judgment of sentence and remand to the Court of Criminal Appeals with instructions to remand this cause to the circuit court for a new trial on the issue of sentence in accordance with this Court's opinion in Beck after remand.

---

[2]See Brady v. United States, 397 U.S. 742 (1970).

My differentiation between the conviction and the sentence is based primarily on the lack of a bifurcation of the pre-Beck jury proceedings with respect to the finding of guilty and the fixing of the sentence. While it can be said that the United States Supreme Court's Beck mandate does not conclusively require a reversal of Ritter's conviction, I think its mandate is equally clear that the sentencing procedure, which is influenced by factors other than absence or presence of lesser included offenses criteria, is impermissibly tainted, requiring a sentence hearing pursuant to the restructured proceedings established by Beck after remand.[3]

Maddox and Adams, JJ., concur

---

[3]See Brady v. Maryland, 373 U.S. 84 (1963); Parker v. North Carolina, 397 U.S. 790 (1970).

MADDOX, JUSTICE (Concurring specially in denial of rehearing).

I concur in this Court's action, on application for rehearing, to extend its prior opinion to indicate that its reversal of Ritter's conviction was grounded on this Court's interpretation of what the Supreme Court of the United States mandated in Beck v. Alabama, ___ U.S. ___ (1980). This Court considered Ritter's case, in light of Beck, only because the case was remanded here at the request of the Attorney General. In brief, the Attorney General sets out the facts:

> On June 20, 1980, the United States Supreme Court issued its decision in Beck v. Alabama, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). On June 23, 1980, the State filed a letter in the United States Supreme Court arguing that Ritter's case was distinguishable from Beck, because there was no evidentiary basis for a lesser included offense in Ritter's case. In view of that difference, the letter

> requested that the Court remand Ritter's case to the Alabama Supreme Court for reconsideration in light of Beck, rather than reversing it on authority of Beck.

In view of the above, it is obvious that this Court, which had affirmed Ritter's conviction [Ritter v. State, 375 So. 2d 270 (1979)], now holds Ritter is entitled to a new trial because the United States Supreme Court has mandated it in Beck. Obviously, I do not believe that Ritter is in the same situation as Beck was; therefore, I joined with Mr. Justice Jones in his dissenting views which he expressed on original delivery.

I still adhere to my original view that under the facts of this case, Ritter is not entitled to a new trial to determine his guilt of innocence of the capital offense. He is only entitled to a sentencing hearing before a jury. That there was absolutely no evidence of

Ritter's guilt of a lesser included offense is plain, and had an instruction on lesser included offenses been given in this case, the principle announced in Roberts v. Louisiana, 428 U.S. 325 (1976), would be applicable. There, the Supreme Court of the United States held that the Louisiana death penalty scheme which required juries in all first degree murder cases to also be instructed on manslaughter and second degree murder even if there was not a scintilla of evidence to support such a verdict was unconstitutional.

I think a majority of this Court has misread Beck to require a new trial in a case like Ritter's where the record of trial affirmatively precludes any possibility that the defendant could have adduced any evidentiary support for a lesser included offense. My difference with the majority in this point aside,

however, I agree with the majority's basis for its extension of the opinion on rehearing.

I would also add one additional point on which there is no disagreement among the members of the Court: The order of remand by the Court of Criminal Appeals, as mandated by this Court, is not to be understood as requiring the trial court to instruct the jury on lesser included offenses unless such an offense is supported by the evidence upon retrial of this cause.

Jones and Adams, JJ., concur.

[Clerk's certification omitted in printing]

APPENDIX G

May 8, 1981

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1980-81

77-798

IN THE MATTER OF:

WAYNE EUGENE RITTER

VS.

STATE OF ALABAMA

AFTER REMAND BY
UNITED STATES
SUPREME COURT

This cause having been duly argued and submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that this cause be reversed and annulled, and that this cause be remanded to the Court of Criminal Appeals with directions to that Court to grant a new trial under the authority of Beck v. Alabama, ___ U.S. ___, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), and Beck v. State [MS. December 19, 1980], ___ So. 2d ___ (Ala. 1980).

OPINION BY SHORES, J.
TORBERT, C.J., FAULKNER, ALMON, EMBRY AND BEATTY, JJ., CONCUR.
MADDOX, JONES AND ADAMS, JJ., CONCUR IN PART AND DISSENT IN PART.

[Clerk's certification omitted in printing]

APPENDIX H

MAY 8 1981

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1980-81

77-798

Ex parte Wayne Eugene Ritter

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: Wayne Eugene Ritter, Alias

v.

State of Alabama)

SHORES, JUSTICE.

Reversed and remanded to the Court of Criminal Appeals with directions to that Court to grant a new trial under the authority of Beck v. Alabama, ___ U.S. ___, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), and Beck v. State [MS. December 19, 1980], ___ So. 2d ___ (Ala. 1980).

REVERSED AND REMANDED.

Torbert, C.J., Faulkner, Almon, Embry, and Beatty, JJ., concur.

Maddox, Jones, and Adams, JJ., concur in part and dissent in part.

JONES, JUSTICE (Concurring in part and dissenting in part):

The majority of the Court, by directing that the Court of Criminal Appeals reverse the judgment of conviction and sentence and remand the case for a new trial, has mandated that all pre-Beck death penalty convictions and sentences be set aside and new trials ordered. As to the judgment of conviction in the instant case, I respectfully dissent.

This death penalty case was remanded by the United States Supreme Court for this Court's reconsideration in light of

Beck v. Alabama, ___ U.S. ___, 100 Sup. Ct. 2382, 65 L. Ed. 2d 392 (1980).

Beck declared unconstitutional the application of the provision of the Alabama Death Penalty Act which precludes the trial court from instructing the jury on lesser included offenses, where, as was the case in Beck, the evidence is susceptible of a finding of such an offense. Here, as in Beck, the jury was instructed, pursuant to Alabama Code 1975, § 13-11-2(a), to return either a verdict of guilty with a sentence of death or a verdict of not guilty, precluding the option of finding the defendant guilty of a noncapital offense.

Unlike Beck, Ritter's evidence of record fails to support any finding other than a verdict adjudging the Defendant guilty of the capital offense as charged. Unquestionably, had the death penalty statute not included the "preclusion of

lesser included offenses" clause (thus conforming the statute to Beck on remand ([MS. December 19, 1980] ___ So. 2d ___ (Ala. 1980)), Ritter would not have been entitled to a jury instruction on lesser included offenses.

As Ritter's counsel suggests, however, this does not end our inquiry; it merely establishes one of the premises upon which the ultimate dispositive issue must be answered. Another essential premise is the further objective fact that the death penalty statute, under which Ritter was tried, convicted, and sentenced to die, did include the "preclusion" clause, the operative effect of which may have unduly restricted Ritter's defense with respect to proof of facts and circumstances sufficient to invoke lesser included offenses instructions.

Stated another way, whether the instant record would have entitled Ritter

to a lesser included offenses instruction (thus offering the jury a third optional finding) is not the issue; rather, the issue is whether Ritter was unconstitutionally denied the benefit of a trial under a valid death penalty statute permitting evidence which would warrant a jury verdict of guilty of a lesser included offense under appropriate instructions.

The State summarizes its argument as follows:

> "There was absolutely no evidentiary basis at Ritter's trial for any lesser included offense instruction. There was no evidentiary dispute about any element of the capital offense, because Ritter confessed to and admitted every element of the capital offense, and he did so both before and during the trial. In addition, Ritter pleaded guilty and his valid guilty plea was accepted by the trial court and entered in the official judgment entry and minutes of the court. The trial court did submit the case to a jury since only a jury can sentence a capital defendant to

> death, but Ritter's voluntary guilty plea still conclusively establishes his guilt and removes any factual issue from the case."

Ritter's "fundamental fairness" argument is premised on the proposition that the "preclusion" clause operated to bar or to discourage alternative trial strategy, including the offering of evidence which would support a noncapital offense verdict. He argues:

> " . . . The very existence of the provision precluding jury consideration of lesser included offenses would almost invariably affect a capital defendant's strategy, the presentation of evidence and even, as in this case whether actively to contest the charges against him. It is clearly constitutionally impermissible for the state to tell a capital defendant that he may not present evidence of lesser included offenses at trial, and then seek to prevent the defendant from complaining of this unconstitutional prohibition on the grounds that he failed to present such evidence."

Although I disagree with the majority's reversal of Ritter's conviction,

I reject the State's contention as an overly simplistic approach. Surely, the presence of the factual issue of lesser included offenses in Beck does not limit the application of its holding to only those cases in which the evidence of record supports such a finding. We do not read Beck as suggesting that a pre-Beck capital defendant was required to so posture his trial strategy as to affirmatively invoke the application of the lesser included offense doctrine, or failing to do so, forfeit the protective cloak of Beck.

While the State, in my opinion, has interpreted Beck far too narrowly, I believe, as to the judgment of conviction, Ritter's counsel has given it an overly broad interpretation.[1] Although his

---

[1]As shown later in this opinion, I accept defense counsel's contention as to the judgment of sentence.

argument is persuasive and, undoubtedly, one that ordinarily will prevail, I do not read Beck, nor the Supreme Court's remand of the instant case, as mandating reversal in every case in which the defendant has been convicted and sentenced to death under Alabama's death penalty statute.

I would hold that the test for answering the issue here presented for our consideration is whether the evidence of record is susceptible of any reasonable hypothesis giving rise to the application of the lesser included offenses doctrine. Because such hypotheses may arise from either the presence or the lack of evidence adduced at trial, this test cannot be met unless the record of trial affirmatively precludes every reasonable hypothesis other than that of the Defendant's guilt of the capital offense as charged. Any reasonable doubt must be

resolved in favor of granting the defendant a new trial.

Therefore, on review of this case, and other pre-Beck capital convictions henceforth, I would apply the following objective standard: The conviction is affirmable if, and only if, a composite of the testimony, after indulging every reasonable doubt in favor of the defendant, affirmatively reveals a clear, unequivocal and undisputed chain of events comprising all of the elements of the capital offense to the total exclusion of any reasonable fact or circumstance supportive of a lesser included offense. The inference of such an hypothesis necessarily arises unless the proof of record establishes defendant's guilt of the capital offense fully and undisputably, affirmatively precluding every reasonable inference to the contrary.

Applying this standard of review to the instant case, I am unable to perceive from the proof of record before us any possible hypothesis other than that of the Defendant's guilt of the capital offense as charged in the indictment.

Aided by the Court of Criminal Appeals' summary of the evidence in Evans and Ritter v. State, 361 So. 2d 654, 656-661 (Ala. 1977), and Ritter v. State, 375 So. 2d 266, 267 (Ala. 1978), and by this Court's opinion, after return of the case from remand (Ritter v. State, 375 So. 2d 270, 273 (Ala. 1979)), I have again made an independent review of the entire record in a painstaking search for the slightest hint that Ritter was restricted, or otherwise influenced, in the conduct of his defense by the omnipresence of the statutory edict that the jury either sentence him to die or set him free. I find none.

Indeed, to the minutest detail, the State's proof of each and every element of the capital offense is verified and amplified by Ritter's own testimony. In addition to pleading guilty of the capital crime as charged, he took the witness stand--against advice of counsel and following the trial court's thorough admonition as to his constitutional rights--and recounted in great detail his and his companion's trail of crime leading up to and including the murder of the pawnshop proprietor during a planned armed robbery of the victim, agreeing in advance to kill the robbery victim if necessary.

The posture of this record affirmatively precludes any reasonable hypotheses other than that of Defendant's guilt of the capital crime as charged in the indictment. Where, as here, the voluntary testimony of a mentally competent defendant affirmatively

eliminates any possible inference which would support a finding of guilty of a noncapital lesser included offense, we are constrained to hold that the unconstitutional provision excised by Beck visited no impermissible restraint upon the Defendant in the conduct of his defense, including his right to actively contest the charges against him.

To hold otherwise would be tantamount to allowing the Defendant, by way of a new trial, to raise factual issues wholly contrary and in direct contradition to those established by his own sworn testimony in the original trial. His option to so testify in the original trial cannot be said to have been impermissibly encouraged by the constitutionally invalid "preclusion" clause.[2]

---

[2]See Brady v. United States, 397 U.S. 742 (1970).

While I would affirm the judgment of conviction, I, nonetheless, would reverse the judgment of sentence and remand to the Court of Criminal Appeals with instructions to remand this cause to the circuit court for a new trial on the issue of sentence in accordance with this Court's opinion in Beck after remand.

My differentiation between the conviction and the sentence is based primarily on the lack of a bifurcation of the pre-Beck jury proceedings with respect to the finding of guilty and the fixing of the sentence. While it can be said that the United States Supreme Court's Beck mandate does not conclusively require a reversal of Ritter's conviction, I think its mandate is equally clear that the sentencing procedure, which is influenced by factors other than absence or presence of lesser included offenses criteria, is

impermissibly tainted, requiring a sentence hearing pursuant to the restructured proceedings established by Beck after remand.[3]

Maddox and Adams, JJ., concur.

---

[3]See Brady v. Maryland, 373 U.S. 84 (1963); Parker v. North Carolina, 397 U.S. 790 (1970).

APPENDIX I

UNITED STATES SUPREME COURT

ORDERS

June 30, 1980

No. 79-5026. WILLIAMSON v. ALABAMA;

No. 79-5301. WILSON v. ALABAMA;

No. 79-5458. HORSLEY v. ALABAMA;

No. 79-5525. CADE v. ALABAMA;

No. 79-5563. BALDWIN v. ALABAMA;

No. 79-5709. THOMAS v. ALABAMA;

No. 79-5741. RITTER v. ALABAMA; and

No. 79-5835. MACK v. ALABAMA. Sup. Ct. Ala. Motions of petitioners for leave to proceed in forma pauperis and certiorari granted. Judgments vacated and cases remanded for further consideration in light of Beck v. Alabama, 447 U.S. 625 (1980). Reported below: No. 79-5026, 370 So. 2d 1066; No. 79-5301, 371 So. 2d 943; No. 79-5458, 374 So. 2d 375; No. 79-5525, 375 So. 2d 828; No. 79-5563, 372 So. 2d 32; No. 79-5709, 373 So. 2d 1167;

No. 79-5741, 375 So. 2d 270; No. 79-5835, 375 So. 2d 504.

APPENDIX J

Ex parte Wayne Eugene RITTER.

(In re Wayne Eugene Ritter

v.

State of Alabama)

77-798.

Supreme Court of Alabama.

July 6, 1979.

Rehearing Denied Sept. 7, 1979.

The Supreme Court of Alabama, 361 So. 2d 666, remanded case in which defendant had been sentenced to death for consideration of the applicability to defendant's appeal of a statutory provision precluding the use of the felony-murder doctrine to supply evidence of intent. On remand, the Court of Criminal Appeals, 375 So. 2d 266, determined that the felony-murder doctrine was not improperly used to supply the intent required to convict under the capital felony statute and affirmed the

conviction. Defendant petitioned for certiorari, and the Supreme Court, Faulkner, J., held that: (1) the jury was not allowed to supply the intent required under the capital felony statute through the use of a felony-murder doctrine; (2) the evidence was sufficient to establish that defendant was an accomplice to the intentional killing of a pawnshop operator; (3) any error in the trial court's charge on the law of accomplices did not adversely affect defendant's substantial rights and was knowingly waived by defendant; (4) there was no constitutional infirmity in imposing the death sentence; (5) the possibility of any injury to defendant from the trial court's failure to charge on the elements of robbery was eliminated by defendant's prior knowing and voluntary plea of guilty to charges of robbery and intentional killing; and (6) defendant knowingly and

voluntarily waived any errors in the charge.

Affirmed.

Beatty, J., dissented.

FAULKNER, Justice.

This appeal comes to this Court on certiorari for the second time. Previously we remanded to the Court of Criminal Appeals for that court to consider whether or not the felony-murder doctrine was used to supply the requisite intent under our capital felony statute. Evans and Ritter v. State, 361 So. 2d 666 (Ala. 1978). On remand that court determined that the felony-murder doctrine was not so used and affirmed Ritter's conviction. Ritter v. State, [MS. Aug. 9, 1978] 375 So. 2d 266 (Ala. Crim. App. 1978). For the reasons set out below, we also conclude that the conviction must be affirmed.

Briefly, the facts of this case are as follows: Ritter, along with a companion, John Louis Evans, was charged under the capital felony statute, § 13-11-2(a)(2), Code 1975, with the intentional killing and robbery of Edward Nassar, a Mobile pawn shop owner. Contrary to the repeated advice of his attorney, Ritter entered a plea of guilty to the charge. At arraignment and prior to the entry of his guilty plea Ritter was thoroughly advised of his constitutional rights both by the trial judge and by his attorney in open court. Ritter was continuously asked if he understood what was being said, to which he replied that he did. He was given the opportunity to ask questions about his rights and the trial procedure, but he affirmatively declined to do so. After Ritter entered his guilty plea the trial judge ordered the matter presented to a jury since only

a jury may sentence a defendant to death under our capital felony statute. § 13-11-1, et seq., Code 1975. At trial the State presented a prima facie case against Ritter which included his confession. (The testimony of each witness is outlined in the original opinion of the Court of Criminal Appeals, Evans and Ritter v. State, 361 So. 2d 654 (Ala. Crim. App. 1977). After the State rested, Ritter himself took the stand and detailed the robbery and killing. (His statement is set out in full in the opinion by the Court of Criminal Appeals noted above. 361 So. 2d at 660-661). Although Ritter initially refused to say who fired the shot that killed Nassar, it was apparent at trial from both the State's evidence and the testimony of Evans that it was Evans, not Ritter, who actually fired the fatal shot. In this regard Ritter testified that his gun was loaded and that

he would have killed Nassar if he had had an opportunity, but "John [Evans] was in my line of fire . . . I was there in case he missed." Ritter further stated, "We knew we might have to kill somebody during any robbery. We had discussed it before. If anybody went for a gun, that's what was going to happen. We did kill him, so, really, the only thing you can come back with is the death penalty."

Following closing arguments the trial judge charged the jury. No objections were made to the charge. The jury found Ritter "guilty as charged in the indictment" and fixed his punishment at death by electrocution. The trial judge subsequently conducted a sentencing hearing as required by §§ 13-11-3 and 13-11-4, Code 1975, and entered findings of fact regarding the aggravating and mitigating circumstances listed in

§§ 13-11-6 and 13-11-7, Code 1975. In his findings of fact the trial judge noted that, ". . . while Mr. Wayne Eugene Ritter was an accomplice in the Capital Felony committed by another person, his participation was not relatively minor,and by Mr. Ritter's own statement, he was prepared to shoot Edward A. Nassar, deceased, but could not fire because his accomplice, John L. Evans, III, was in his line of fire." The trial judge then "accepted" the death penalty as fixed by the jury.

FELONY MURDER V. ACCOMPLICE LIABILITY

The first issue presented for our consideration is whether or not the jury was allowed to supply the requisite intent under the capital felony statute through the use of the felony-murder doctrine. § 13-11-2(b), Code 1975, specifically states: "Evidence of intent under this

section shall not be supplied by the felony-murder doctrine." The felony-murder doctrine provides that when a homicide is committed in the course of or during an attempt to commit certain felonies which are inherently dangerous to life, the intent which must be shown to support a conviction for murder (variously described as malice aforethought, the specific intent to take life, or a willful, deliberate, malicious, and premeditated killing) is supplied by the criminal intent involved in the underlying felony. Under the doctrine it is not necessary that the individual accused of murder should have contemplated, intended, or willed the death of the victim. Hardley v. State, 202 Ala. 24, 79 So. 362 (1918); Kilgore v. State, 74 Ala. 1 (1883); Mitchell v. State, 60 Ala. 26 (1877): Fields v. State, 52 Ala. 348 (1875). Culpability stems instead from

the accused's participation in an inherently dangerous felony--one in which he should have known that there was a substantial possibility that someone would be killed. In this state felony-murder is statutorily classified as murder in the first degree, § 13-1-70, Code 1975, a crime punishable by life imprisonment. § 13-1-74, Code 1975.

The felony-murder doctrine has been severely criticized, primarily because in a variety of fact situations it often operates to charge an individual with first degree murder when the accused did not have the required intent for murder or when the homicide was the result of the actions of a third party over whom the accused had little or no control. See e.g. W. LaFave & A. Scott, Criminal Law 545-561 (1972); Comment, The Constitutionality of Imposing the Death Penalty for Felony Murder, 15 Hous.L.Rev. 356,

365-371 (1978); Comment, Constitutional Limitations Upon the Use of Statutory Criminal Presumptions and the Felony-Murder Rule, 46 Miss.L.J. 1921 (1975). The doctrine has been eliminated from the Model Penal Code, which instead provides for a rebuttable presumption of extreme recklessness when a homicide occurs in the course of certain felonies. Model Penal Code § 210.2 (Proposed Official Draft, 1962). See also Model Penal Code § 201.2, Comments, para. 4 at 33 (Tent. Draft No. 9, 1959). The use of the felony-murder doctrine is considered particularly harsh in the capital punishment context, where constitutional safeguards and public attitudes demand that the extreme penalty be meted out only for the most reprehensible crimes. As one commentator has observed, "[T]he death penalty is an untenable sanction for negligent or accidental homicide." 15 Hous.L.Rev.

supra at 381. It was, no doubt, this dissatisfaction with the doctrine which led our legislature to prohibit its use in the trial of capital felonies in § 13-11-2(b).

The legislature did, however, indicate that an accomplice in a capital felony could be sentenced to death under our statute, for it included accomplice liability as a factor to be considered during the sentencing hearing under both aggravating circumstances, § 13-11-6(4), and mitigating circumstances, § 13-11-7(4). The significant distinction between use of the felony-murder doctrine and use of accomplice liability in this context is that accomplice liability requires a greater showing of the defendant's individual intent. Under Alabama law, in order to hold an individual as an accomplice the State must prove that he aided and abetted in the

crime, terms which "'comprehend all assistance rendered by acts or words of encouragement or support or presence, actual or constructive, to render assistance should it become necessary.'" Jones v. State, 174 Ala. 53, 57 So. 31 (1911). As we noted in Jones, key elements of accomplice liability are encouragement or presence "with a view to render aid should it become necessary." When liability is predicated on the latter it is essential that the principal be aware of the accomplice's support and willingness to lend assistance. Jones, supra. Thus an accomplice, while he may not have actually committed the crime by delivering the blow or firing the shot, has sanctioned and facilitated the crime so that his culpability is comparable to that of the principal. In Alabama, as in many states, this premise is statutorily recognized in § 13-9-1 which abolished

the old common law distinctions among accessories before the fact, principals in the second degree, and principals in the first degree and provides that ". . . all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense or aid or abet ir its commission, though not present, must hereafter be indicted, tried and punished as principals . . .."

From the foregoing it is clear that the felony-murder doctrine was not used in this trial. (Indeed, it was never even mentioned.) Instead Ritter could be convicted and sentenced to death under our capital felony statute as an accomplice in the intentional killing of Nassar. (There was also evidence from which the jury could have found that Ritter, aside from his status as an accomplice, had the particularized intent to kill. Of course, it is not contended that Ritter is not

fully liable as a principal for the robbery.) The question then becomes, did the State prove that Ritter was an accomplice to the intentional killing? We think that it did. Through Ritter's confession and again through his voluntary statements at trial the State showed that Ritter and Evans had a prior agreement that anyone who attempted to go for a gun would be killed. This possibility was discussed beforehand and planned for. As Ritter himself stated, the only reason he did not shoot Nassar himself was because Evans was in the way. Clearly Ritter encouraged and supported the killing and was present with Evans' knowledge to render assistance should it become necessary.

The further point is raised in this appeal that the trial judge did not properly charge the jury on the law of accomplices. Apparently at the State's

request the trial judge charged, "The law is that anyone who aids or abets in the commission of an offense must be indicted, tried, and punished as if he were the principal." The defendant did not offer any charges or object to the charge as given. Admittedly, the charge was brief and should have preferably included some explanation of the terms "aid" and "abet." Nevertheless, we believe that, for the same reasons stated below in reference to the robbery charge, any error did not adversely affect Ritter's substantial rights and was knowingly waived by Ritter.

Ritter also contends that the death penalty is a disproportionate sentence in light of his involvement in the capital felony and therefore violates the Eighth and Fourteenth Amendments. Ritter attempts to bolster his position by portraying himself as a mere accomplice to the robbery, "a minor participant" in a

crime which led to a killing by someone else. The record, however, refutes this description of Ritter's part in the crime at every point. It was Ritter, not Evans, who asked to see a .38 caliber Colt revolver, who began to load it with ammunition he had brought with him specifically for this purpose, and who carried the revolver out of the pawn shop after Nassar was shot. Thus Ritter could not seriously be considered a "minor participant" in the robbery, and, as we have noted above, he was clearly an accomplice to the killing.

With this more accurate description of Ritter's participation in the intentional killing and robbery in mind we must consider whether the death penalty is a disproportionate sentence for an accomplice to the killing. This is a question which has not yet been decided by the United States Supreme Court, although

several cases before that Court have raised the issue. See Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); Bell v. Ohio, 438 U.S. 637, 98 S. Ct. 2977, 57 L. Ed. 2d 1010 (1978); Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976). In each of these cases the Court reversed on other grounds and did not reach the issue of disproportionality. While we opine that there may be situations where an accomplice's participation is so minor that the death penalty would be constitutionally impermissible, such is not the case here. As the trial judge stated, Ritter's participation was not relatively minor. The Court of Criminal Appeals agreed, and so do we. Ritter stands at the most culpable end of the spectrum of accomplice liability. He is closer to an individual who fires a non-fatal shot in a killing rather than

one who waits outside as a lookout. By Ritter's own statement it was mere fortuity which made John Evans the triggerman and not Ritter. Consequently, we see no constitutional infirmity in imposing the death sentence in this case.

THE ROBBERY CHARGE

By way of supplemental brief Ritter asserts that the trial judge committed reversible error by failing to charge the jury on the elements of robbery. In Clements v. State, 370 So. 2d 723 (Ala. 1979), we noted that an instruction on the elements of robbery must be given when a defendant is charged under 13-11-2(a)(2), as was Ritter. It is undisputed that no charge explaining robbery was given to the jury here.

Such an omission does not, however, lead to a reversal in this case. Rule 39(k), ARCP, now provides:

"In all cases in which the death penalty has been imposed, upon review of the opinion of the court of criminal appeals on certiorari, the supreme court may notice any plain error or defect in the proceeding under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial rights of the petitioner. (Amended 10-2-78, eff. 12-1-78.)"

In the instant case it is abundantly clear that no injury resulted from the trial judge's omission. Under the circumstances, the possibility of any injury to Ritter from the incomplete charge is eliminated by his earlier plea of guilty.

In this regard we note that Ritter's guilty plea was without doubt knowingly

and voluntarily entered. Prior to his arraignment Ritter filed a "motion of intent to enter guilty plea" which, among other matters, asserted, "That the defendant has openly and publicly admitted his guilt after being advised of his constitutional rights numerous times, and still admits his guilt as charged in both indictments." At his arraignment Ritter was advised of his rights under both the United States Constitution and state law. Indeed, the colloquy among the trial judge, the attorneys, and Ritter himself was extremely thorough and demonstrates that the trial judge as well as Ritter's attorney made every effort to assure that Ritter understood the benefits of a jury trial which would be forfeited by a plea of guilty. Nevertheless, against the advice of his attorney, Ritter entered a guilty plea to the robbery and intentional killing of Nassar. (He also pled guilty

to the robbery of a Radio Shack in Mobile.) The trial judge, however, did not accept the guilty plea but instead set the matter for presentation to a jury. At the trial the State presented its case in considerable detail and showed each of the elements of robbery, all of which were admitted by Ritter on the witness stand. Thus Ritter, after having entered a guilty plea, had the additional benefit of a full jury trial as well.

We also decline to reverse this case on the basis of any omissions in the charge because it is apparent that Ritter knowingly and voluntarily waived any errors in the charge. That such a waiver may take place goes without saying, since defendants are regularly allowed to waive the entire panoply of constitutional rights, as well as those accorded under state law. (In fact, in the present case Ritter waived a challenge to the make-up

of the grand and petit juries which had previously been declared unconstitutional by the United States District Court.) Here Ritter voluntarily maintained a course of assisting the State in proving its case, even to the point of telling the jury himself from the witness stand, "the only thing you can come back with is the death penalty." Consequently, we can only conclude that his failure to object to the charge, to present proposed charges, or otherwise to bring any omissions in the charge to the court's attention was a calculated decision on the part of Ritter himself, and not an oversight on the part of his attorney. To grant a reversal now, under these circumstances, on the basis of the charge would be a travesty of justice and would simply invite defendants to ignore errors during a trial in the hopes that, if convicted and reversed on appeal, a second jury would be more lenient.

For the foregoing reasons petitioner's conviction and sentence of death is affirmed.

AFF[illegible].

TORBERT, C. J., and BLOODWORTH, MADDOX, JONES, ALMON, SHORES and EMBRY, JJ., concur.

BEATTY, J., dissents.

BEATTY, Justice (dissenting):

I adhere to the views expressed in my dissent in Evans v. State, Ala., 361 So. 2d 666 (1978).

APPENDIX K

February 5, 1982

THE STATE OF ALABAMA--JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1981-82

Ex parte State of Alabama

Petition for Writ of Certiorari
to the Court of Criminal Appeals

(Re: Homer Lawrence Lane

80-803 v.

State of Alabama)

MADDOX, JUSTICE.

The sole issue in this case is whether a defendant who entered a plea of guilty to a capital offense, and who was sentenced to life without parole, is entitled to withdraw that plea of guilty and obtain a new trial in light of Beck v. Alabama, 447 U.S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980); on remand, Beck v. State, 396 So. 2d 645 (Ala. 1981) (wherein

the Court held that the constitutionally infirm clause in Alabama's death penalty statute, which precluded trial judges from giving lesser included offense instructions in capital cases, could be severed from the death penalty statute).

When the state filed its petition for certiorari in this Court, there was pending here a case which presented the same issue. The case was Graham v. State, 403 So. 2d 275 (Ala. Cr. App. 1980); cert. quashed 403 So. 2d 286 (Ala. 1981). In Graham, the Court of Criminal Appeals upheld the conviction. In this case, a majority of the Court of Criminal Appeals reversed Lane's conviction on "mandate of the Supreme Court of Alabama in Ritter v. State [403 So. 2d 154 (Ala. 1981)] and authorities therein cited, and Ricardo Cook v. State, MS. 6 Div. 461, this day decided. ..."

In Ricardo Cook v. State, [MS. 6 Div. 561, June 23, 1981], ___ So. 2d ___ (1981), a majority of the judges of the Court of Criminal Appeals were of the opinion that ". . . every pre-Beck death case must be reversed, regardless of the lack of evidence on lesser offenses." In reaching this conclusion, the Court of Criminal Appeals has misapplied the law announced by this Court in Beck and Ritter v. State, 403 So. 2d 154 (Ala. 1981), and has failed to apply the principles of law set forth in Graham v. State, 403 So. 2d 275 (Ala. Cr. App. 1980), cert. quashed 403 So. 2d 286 (Ala. 1981).

This Court did not write an opinion in Graham, but the rationale upon which the judgment to quash the writ was based in Graham was that a plea of guilty voluntarily made in a case wherein the

death penalty was not imposed waives all non-jurisdictional defects.[1]

What was the effect of Lane's plea of guilty which was voluntarily made and upon which his judgment of conviction was based and upon which he was sentenced to life imprisonment without parole?

One of the most basic principles of the criminal law was stated in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 23

---

[1]There is disagreement on this Court on whether a plea of guilty in a capital case when the death penalty is imposed also waives all non-jurisdictional defects. See dissenting opinion in Ritter v. State, 403 So. 2d at p. 155. The Supreme Court of the United States has agreed to review the Ritter case. Certiorari was granted by the United States Supreme Court on October 15, 1981, 50 U.S.L.W. 3267; and that case was remanded to us for further consideration in light of Reed v. State, on October 26, 1981; answer of this Court on remand from the United States Supreme Court dated December 11, 1981, held that the decision in Ritter was based on federal constitutional grounds. ___ So. 2d ___ (1981).

L. Ed. 2d 274 (1969), where the Supreme Court opined:

> ". . . A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment. ..."

395 U.S. 238, 242, 23 L. Ed. 2d 274, 279.

It is universally held that a voluntary plea of guilty waives all non-jurisdictional defects. Lancaster v. State, 362 So. 2d 271 (Ala. Crim. App. 1978), cert. den. 362 So. 2d 272 (1978); Franklin v. United States, 589 F. 2d 192, 194, 195 (5th Cir. 1979), cert. den. 441 U.S. 950, 99 S. Ct. 2177, 60 L. Ed. 2d 1055.

The factual setting in this case is not dissimilar to the fact situation in Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). Brady involved the Federal Kidnapping Statute which provided that only a jury

could set a death penalty. Brady, charged under the Act, sought to avoid the death penalty, first, by waiving trial by jury and, when that was disallowed, by pleading guilty. The Supreme Court of the United States, a few years later, in United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968), invalidated and severed the death penalty provision from the Federal Kidnapping Statute on the grounds that it tended to coerce defendants into waiving trial by jury or to plead guilty. When Brady was sentenced under the Federal Kidnapping Statute upon his plea of guilty, the Supreme Court of the United States had not invalidated the death penalty provision from the statute. The Court refused to set aside Brady's conviction. The Court opined:

> "It may be that Brady, faced with a strong case against him and recognizing that his chances for acquittal were

slight, preferred to plead guilty and thus limit the penalty to life imprisonment rather than to elect a jury trial which could result in a death penalty. But even if we assume that Brady would not have pleaded guilty except for the death penalty provision of [the federal kidnapping statute], this assumption merely identifies the penalty provision as a 'but for' cause of his plea. That the statute caused the plea in this sense does not necessarily prove that the plea was coerced and invalid as an involuntary act."

397 U.S. 742, 749-750, 25 L. Ed. 2d 747, 757. The Court added:

"It is true that Brady's counsel advised him that [the federal kidnapping statute] empowered the jury to impose the death penalty and that nine years later in United States v. Jackson, supra, the Court held that the jury had no such power as long as the judge could impose only a lesser penalty if trial was to the court or there was a plea of guilty. But these facts do not require us to set aside Brady's conviction.

"Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing

leniency should a guilty plea be offered and accepted. Considerations like these frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time. The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent misrepresentation or other impermissible conduct by state agents, cf. Von Moltke v. Gillies, 332 U.S. 708, 92 L. Ed. 309, 68 S. Ct. 376 (1948), a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack

> because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.
>
> "The fact that Brady did not anticipate United States v. Jackson, supra, does not impugn the truth or reliability of his plea. We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the state would have had a weaker case than the defendant had thought or that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions."

397 U.S. 742, 756-757, 25 L. Ed. 2d 747, 761.

In reaching the conclusion we reach in this case, we have considered the fact that the record indicates that Lane contended in his first petition for writ of error coram nobis that he had a defense

of alibi. Lane v. State, 7 Div. 700 (Ala. Crim. App. 1979), cert. den. 386 So. 2d 216 (Ala. 1979).

The decision of the Court of Criminal Appeals conflicts with this Court's decision in Graham v. State, 403 So. 2d 275 (Ala. Cr. App. 1980), cert. quashed 403 So. 2d 286 (Ala. 1981). It is due to be reversed and the cause remanded to that court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Torbert, C. J., Faulkner, Jones, Almon, Shores, Embry, Beatty and Adams, JJ., concur.

Opposition

Supreme Court, U.S.
FILED
APR 20 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1981
No. 81-1600

STATE OF ALABAMA,

Petitioner,

v.

WAYNE EUGENE RITTER,

Respondent.

MEMORANDUM OPPOSING CERTIORARI

Respondent Wayne Eugene Ritter was the co-defnedant of John Louis Evans III whose case is currently pending before this Court in Hopper v. Evans. No. 80-1714. (Submitted following oral argument March 24, 1982). The argument contained in Respondents' brief in Evans apply a fortiori to respondent Ritter's case. In addition, Respondent Ritter in no way participated in the actual killing which led to his conviction and death sentence. He was plainly the non-trigger-man. As the Alabama Supreme Court noted, it "was Evans, not Ritter who fired the fatal shot" Ritter v. State, 375 So.2d 270, 273 (Ala. 1979).

The ruling of the Alabama Supreme Court in Ritter v. State, No. 77-798 (Ala. 1981)(which ordered a new trial for respondent) was correct for reasons similar to those argued by his co-defendant Evans before this Court. The Alabama Supreme Court's decision in this case was correct and should not be reviewed.

Respectfully submitted,

JOHN L. CARROLL
1001 S. Hull Street
P. O. Box 2087
Montgomery, AL 36103-2087

ATTORNEY FOR RESPONDENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1600

STATE OF ALABAMA,

Petitioner,

v.

WAYNE EUGENE RITTER,

Respondent.

CERTIFICATE OF SERVICE

I, John L. Carroll, a member of the Bar of the Supreme Court of the United States, do hereby certify that on this 17 day of April, 1982, I did serve copies of this Brief in Opposition and Respondent's Motion for Leave to Proceed In Forma Pauperis, on petitioner, by placing in the United States Mail, first class postage prepaid, one copy properly addressed to the counsel of record for petitioner as follows:

Honorable Edward Carnes
Assistant Attorney General
250 Administrative Building
64 N. Union Street
Montgomery, Alabama 36130

I further certify that I have served all parties required to be served.

Respectfully submitted,

JOHN L. CARROLL
1001 S. Hull Street
P. O. Box 2087
Montgomery, AL 36103-2087
205/264-0286

ATTORNEY FOR RESPONDENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1600

STATE OF ALABAMA,

Petitioner,

v.

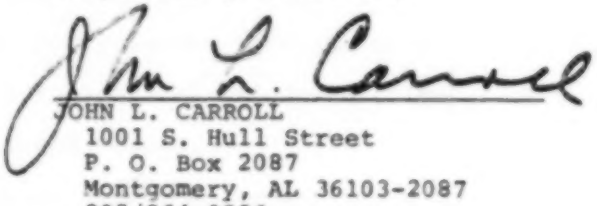
WAYNE EUGENE RITTER,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, Wayne Eugene Ritter, by his undersigned counsel, asks leave to file the attached Brief in Opposition to a Petition for Writ of Certiorari and to proceed in forma pauperis pursuant to Rule 46. Counsel has not yet received an affidavit from the Petitioner, who is in the custody of the State of Alabama at the William C. Holman Unit of Alabama's state prison system at Atmore, Alabama. Mr. Ritter's affidavit in support of this motion will be forwarded to this Court immediately upon receipt.

Respectfully submitted,



JOHN L. CARROLL
1001 S. Hull Street
P. O. Box 2087
Montgomery, AL 36103-2087
205/264-0286

ATTORNEY FOR RESPONDENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1600

STATE OF ALABAMA,

Petitioner,

v.

WAYNE EUGENE RITTER,

Respondent.

AFFIDAVIT

STATE OF ALABAMA)
)
COUNTY OF MONTGOMERY)

JOHN L. CARROLL, being duly sworn, states:

1. I am counsel to Wayne Eugene Ritter in Alabama v. Ritter, now pending in this Court on petition for writ of certiorari, and I make this affidavit in support of Mr. Ritter's motion for leave to proceed in forma pauperis. My representation of Mr. Ritter is without remuneration.

2. Mr. Ritter is presently in the custody of the State of Alabama and is not immediately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to Mr. Ritter by me and will be forwarded to this Court immediately upon receipt. A copy of the affidavit to be signed by Mr. Ritter is attached hereto.

3. Respondent had counsel appointed to represent him at his trial and on his appeal.

4. I am informed and believe that because of his poverty, Mr. Ritter is unable to pay the costs of this cause or to give security for same.

5. I believe that Mr. Ritter is entitled to redress in this cause for the reason that his conviction and sentence of death were obtained in violation of his rights under the Eighth and Fourteenth Amendments to the Constitution of the United

States.

John L. Carroll

Sworn to and subscribed before me, this ____ day of April, 1982.

Notary Public

My commission expires: 5/22/85.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1600

STATE OF ALABAMA,

Petitioner,

v.

WAYNE EUGENE RITTER,

Respondent.

AFFIDAVIT

STATE OF ALABAMA)
)
COUNTY OF)

I Wayne Eugene Ritter, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the respondent in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. Counsel is serving on my behalf without remuneration on my present appeal.

5. I believe that I am entitled to the redress I seek in said cause.

_____
WAYNE EUGENE RITTER

Sworn to and subscribed before me this ____ day of April, 1982.

_____
Notary Public

My commission expires:_____.